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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ' ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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SIR JAMES AIKINS, K.C., M.P.

[*Contributed by* A. H. F. Lefroy, Esq., K.C.]

Sir James Albert Manning Aikins is of Irish descent. He is the son of the late Honourable J. C. Aikins, who was a member of the late Sir John Macdonald's Cabinet and a Lieutenant-Governor of Manitoba. Sir James was born at "Richview" in the county of Peel, Ontario, on December 10, 1851. He is a member of the Ontario, Manitoba, Alberta, and Saskatchewan Bars, was made King's Counsel in 1884, and was for thirty years counsel for the Western Division of the Canadian Pacific Railway Company, and solicitor for several banks and public companies. He has also been President of the Manitoba Law Society several times, and has served on many important public commissions, including the chairmanship of the Royal Commission on Manitoba University in 1906. He received the honour of knighthood in 1914. Like his father, Sir James has always taken an active interest in the politics of his country. He has had much to do with the growth of Winnipeg, and was for many years associated with Western Canada as counsel for the Dominion Department of Justice. The Dominion Government appointed him to be a Commissioner to investigate the administration of justice in the North-West Territories in 1880. He has been spoken of many times as a "force" in the community, and for a man of his comparatively early age has accomplished many things in his career. Although himself a resident of Winnipeg, he carried the constituency of Brandon, formerly held by the Hon. Clifford Sifton, late Minister of the Interior, by a large majority at the election of 1911, and at the late session of the Dominion House he took a prominent part as chairman of an important committee. He is a member of boards of directors of some of Manitoba's strongest local financial companies and is perhaps as well and favourably known in professional and financial circles as any one in the Province. He was President at the first meeting of the Canadian Bar Association at Montreal on March 19 last, and gave a learned and striking address[1] upon the subject of "Advancing the Science of Jurisprudence in Canada."

[1] On pp. 277-8 are some extracts from this suggestive address.

THE RIGHT HON. SIR WILLIAM RANN KENNEDY, LL.D., F.B.A.

I.

[*Contributed by* The Rt. Hon. Lord Justice Phillimore, D.C.L., LL.D.]

Lord Justice Kennedy was equipped for his work as a judge with a wide general culture founded on the classics, considerable political insight obtained as private secretary to a Cabinet Minister and during the course of his parliamentary candidatures, some acquaintance with continental jurisprudence and much deeper acquaintance with American judicial decisions.

His practice as an advocate was for a long time at Liverpool, and his wider range after he became a Q.C. did not last long enough to give him many opportunities of great forensic argument when at the Bar. He had no such chances as Cohen had, and indeed he was still young when he was made a Judge.

As soon as he was raised to the Bench his acquaintance with shipping and mercantile law led to his being often requested to sit in the Commercial Chamber of the Queen's Bench Division, commonly called "The Commercial Court," and most of his important judgments when he was a judge of first instance are on commercial matters. It fell to his lot, however, to try the important case of *Allen* v. *Flood*, where his most careful and painstaking judgment[1] upon the law of conspiracy, and civil liability therefor, was sustained by the Court of Appeal, though it was ultimately reversed in the House of Lords.

It may almost have been said to have been a piece of ill fortune, rather than good, that he happened to be judge in Revenue matters in the first year in which the new scheme of compensation for superfluous licences in the liquor trade came into operation, and that it therefore fell to his lot to determine the principle on which that compensation had to be assessed, and that his judgment[2] was so unimpeachable that no one ventured to question it on appeal, and thereafter the so-called "Kennedy Judgment" became a text for much heated discussion.

As to his judgments on commercial subjects I have been looking through the Reports of Commercial Cases, and from Volumes 2 to 12, 1896 to 1906—that is, from the beginning of the second stage of the Court after Mr. Justice Mathew had launched it till the time that Kennedy was raised to the Court of Appeal—there is not a volume in which there are not several of his decisions,

[1] Reported as *Flood* v. *Jackson*, [1895] 2 Q.B. 21.

[2] The case is reported as *Ashby's Cobham Brewery Case*, [1906] 2 K.B. 754.

working out the law of charter parties, bills of lading, marine insurance and agency.

It is difficult to pick out any particular case, but in the ever-constant adaptation of our mercantile law to new conditions of business, Kennedy proved a most useful judge. His decisions show at once flexibility and sound sense and were seldom altered on appeal. Two cases particularly struck me: *The Bechuanaland Exploration Co.* v. *London Trading Bank*,[1] where he upheld the negotiability of bonds to bearer in a very elaborate judgment; and *Diestal* v. *Stevenson & Co.*,[2] where he applied some restriction to the perhaps excessive tendency in our Courts to construe as penalty clauses merely those clauses in contracts by which the parties settle their own measure of damages in the event of a breach. The case is the more remarkable as the particular contract spoke of the agreed damages as a penalty.

In the Divisional Court there was a case—*Dulieu* v. *White*[3]—in which both of us took great interest, and which has since been approved in the House of Lords. We decided that injury to health caused by a mental shock unlawfully given gave a right of action, though the injury had been done by words only and without physical impact. It required some courage to do this in the face of previous authorities.

In the Court of Appeal he never attained sufficient seniority to preside, but he contributed several important judgments, of which the most noticeable are:

Biddell Bros. v. *Clemens Horst & Co.*[4] In that case, where the question arose whether buyers under what is known as a "c.i.f." contract had any right to insist upon inspection of the goods before payment, or were bound to pay upon tender of shipping documents, he was in a minority in the Court of Appeal; but his judgment was accepted in the House of Lords, where it was held, conformably with his view, that buyers must pay at once, Lord Loreburn observing, "The remarkable judgment of Kennedy L.J., illuminating, as it does, the whole field of controversy, relieves me from the necessity of saying much upon the subject."[5]

In *North-Western Salt Co., Ltd.*, v. *Electrolytic Alkali Co., Ltd.*,[6] he was again in a minority in the Court of Appeal, but again was supported by the House of Lords. He took part in *Lord Chesterfield* v. *Harris*,[7] where a claim to fishing rights over the river Wye, alleged to have existed for three centuries, was nevertheless held to have no legal origin, and in *Rex* v. *The Earl of Crewe*,[8] in which the Court of Appeal decided three important points: (1) upon the status of the Bechuanaland Protectorate, that over it the King had power to legislate by Proclamation or other Executive act, and therefore

[1] 3 Commercial Cases 285; [1898] 2 Q.B. 658.
[2] 12 Commercial Cases 1; [1906] 2 K.B. 345.
[3] [1901] 2 K.B. 669.
[4] [1911] 1 K.B. 934.
[5] [1912] A.C. at p. 22.
[6] [1914] A.C. 461.
[7] [1908] 2 Ch. 397.
[8] [1910] 2 K.B. 576.

could by Executive act authorise the detention of the African Chief Sekgome; (2) with regard to the law of *habeas corpus*, that the Secretary of State for the Colonies could not, by reason of his having advised the Executive act, be said to be the detainer of the Chief and answerable to the writ; but (3) that, if there had been a case for a writ, it was right to come to the English Courts, as the Protectorate had no competent Courts within the meaning of the *Habeas Corpus* Act of 1862.

His very last contributions were remarkable. The Lord Chief Justice bore public testimony to the share which he took in the preparation of the judgment in the full Court of Appeal on the *persona standi in judicio* of alien enemies. After his death his surviving colleagues delivered a judgment which he had just finished preparing for them in the case of the *Polurrian S.S. Co., Ltd.*, v. *Young*,[1] and which brings about a considerable change in marine insurance law, treating the Act of 1906, though it is generally known as a codifying Act, as also an amending one, and substituting the test of *unlikelihood* of recovery for that of *uncertainty* of recovery, when the question was one of alleged constructive total loss by capture.

He preserved throughout his judicial career his courtesy, his kindness to younger and less experienced advocates, and his painstaking thoroughness. No labour, no research was grudged.

He had not time to write any elaborate work after he became a judge; and his one work of importance is his *Treatise on the Law of Civil Salvage*, a most complete work. But he contributed several valuable papers which were read at congresses or conferences of lawyers; such were the papers read at the Congress of Lawyers and Jurists at St. Louis, 1904, on the subject "To what Extent should Judicial Action by Courts of a Foreign Nation be recognised?" on "Contraband of War" at the Conference of the International Law Association at Portland, Maine, in 1907; and "On Blockade," at Buda-Pesth, in 1908. One of his most interesting papers was that delivered before the American Bar Association at Buffalo in 1899, "On the State Punishment of Crime."

He was a leading member of the three international legal bodies, being elected an Associate of the *Institut* in 1910, and a full Member in 1913. He joined the International Law Association in 1898, and at once took an active part, and led the European contingents to the Transatlantic Meetings at Buffalo, 1899, where he delivered the Inaugural Address, and at Portland in 1907. He was President from 1908 to 1910, and Chairman of the Executive Council to his death. He took active part in the Conferences of Antwerp, 1903; Berlin, 1906; London, 1910; Paris, 1912; and Madrid, 1913.

At these two last, the question of an International Code of general average came to the front, and he presided at all the deliberations in Conference and of subsequent Committees.

In that offshoot of the International Law Association, *Le Comité Maritime*

[1] [1915] 1 K.B. 922.

International, he also took his share. He was President at the meeting in Liverpool in 1905, and Vice-President at Bremen in 1909, and Chairman of the Committee of the English branch again, to the date of his death.

The subjects in which he was generally found to be taking interest were questions of maritime law, or broad issues in connection with Peace and War. As to the latter, he took what a few years ago was considered the unpopular and retrograde view. He was opposed to the idea that war was a matter between soldiers only; he knew that it must be an affair between nations, and that in the long run it is more humane that it should be so. In consequence, at the *Institut* in 1910 and in the International Law Association he upheld the old English doctrine of capture of enemies' property on the high seas; and at Madrid, where we were discussing the effect of war upon contracts, he took the same line.

How wise he was experience has now shown.

II.

[*Contributed by* Sir Courtenay Ilbert, G.C.B.]

The late Lord Justice Kennedy was one of the original members of the Society of Comparative Legislation, and its Journal is indebted to him for several important and interesting contributions. All of them bore on those international aspects of law to which he directed much of the leisure which he could spare from his purely professional labours, and two of them represent papers which he read at the Conferences on International Law in which he took such an active part.

The first[1] of these contributions describes the proceedings at the twenty-first Conference of the International Law Association, which was held at Antwerp in September 1903. He mentions two points as deserving notice in the general character of the proceedings. One was the absence in the attitude of the speakers of any trace of national prejudice. The tone throughout was genuinely international. "It is," he remarks, "not the least of the merits of conferences of this kind, wherever jurists and men of business from many lands meet to discuss matters of common interest with the useful purpose of carrying into greater harmony, if not to unification, the diverse institutions of law and commerce, which help race and language to divide civilised nations, that by friendly interchange of serious thought they tend continually to lessen prejudices, and to widen the area of faith in the practicability of settling even grave international disputes satisfactorily without war by frank and rational discussion." The other point was that the speeches of the continental members made apparent "something more than a willingness—almost a desire—on questions touching commercial law to be persuaded of the correctness of the English view and to give special weight to its pronouncement. This was the more remarkable when one remembered that

[1] Journal, vol. v. pp. 216-29.

the system of law and legal procedure in Western and Southern Europe is, broadly speaking, homogeneous and different from ours."

Of the topics under discussion he selected three as presenting special interest to readers of this Journal. The first was the execution of foreign judgments, a subject with which he dealt more fully in a later paper. The second was the attitude of this country towards international Conferences. He fully agreed and sympathised with the opinions expressed by Mr. (now Lord) Justice Phillimore in a remarkable paper read before the Conference in regretting our attitude of "aloofness," an attitude which, to the advantage of ourselves and of the world, has been materially modified in later Conferences. The third topic was of a technical nature but of great practical importance, and was one on which his familiarity with shipping law enabled him to speak with special authority. This was the effect of the shipowner's negligence on the doctrine of general average, a point on which the Conference, at the instance of the late Mr. Carver, had adopted an important resolution.

Lord Justice Kennedy's next contribution to our Journal [1] reproduced the address which, as noticed above, he delivered at St. Louis in 1904 on the question, "To what extent should judicial action by Courts of a foreign nation be recognised?" He urged that the spirit in which the question should be approached ought to be of the utmost possible liberality. There is nothing, he said, either profitable or patriotic in national pharisaism. The more one studies the matter the more satisfied one becomes that there are few canons in the domain of international jurisprudence for which the distinctive title of orthodoxy can confidently be claimed. But he did not content himself with laying down general principles. He suggested the irreducible minimum of conditions under which foreign judgments *in personam* should be recognised as valid, and discussed with great care and particularity the extent to which the principles which he advocated should be applied, not only to the comparatively simple cases of judgments *in personam*, but to the more difficult problems of status arising out of marriage, divorce, infancy, and lunacy, and to the complicated questions raised by administration and bankruptcy.

The address on the Law of Blockade, given at Buda-Pesth in 1908, was another of the contributions for which this Journal [2] is indebted to him. It appears in the number to which his portrait and biographical notice are prefixed, and many will doubtless note with special interest his views on such living questions as those covered by the doctrine of continuous voyage.

Then comes a suggestive and inspiriting address [3] on the Unification of Law, delivered before the Liverpool Board of Legal Studies in 1910. It concludes with an eloquent plea for the study of Roman law as one which "will fit the student for useful service in the ranks of the band of workers for the unification of law, and thereby for the achievement of a signal service to our country and to the world at large."

[1] Vol. vi. pp. 106-20. [2] Vol. ix. pp. 239-51. [3] Vol. x. pp. 212-19.

His latest contribution was published in July of last year,[1] on the eve of the war, and was a review of Mr. Erskine Holland's "Letters on War and Neutrality"—letters which had discussed, under peace conditions, questions to which the war has given a terribly practical significance.

A glance at the papers to which I have referred will give a very fair impression of Kennedy's mind and interests. He was a successful lawyer and an eminent judge. But he was much more than either of these. His interest in law was not merely professional, but genuinely scientific. It was the international aspect of law that attracted him most—the aspect which is reached by a comparative study of different systems. He always sought, he never wearied of seeking, he never despaired of finding the immutable and fundamental principles of law which underlie differences of history, race, creed, and country. Faith in the possibility of discovering and establishing these principles permeates all his work.

At Cambridge Kennedy was the most brilliant scholar of his time, carrying on and enhancing the family tradition of scholarship. In later life he continued, like Lord Bowen, to find in classical studies recreation from his professional labours. In 1912 he published a brilliant translation of the *Plutus*. This is the latest, the least known, and not among the best of Aristophanes' plays; but it is, as Kennedy's scholarly introduction points out, well worth studying, not merely as literature, but because of the light which it throws on the economic and social conditions of Athens at the depressing time when it was produced.

When I knew Kennedy first we were both law students, eating together our prescribed dinners at Lincoln's Inn. The charms which then endeared him to his friends were his freshness, vivacity, and simplicity. Those charms he retained when, in the maturity of his intellect, he adorned the Court of Appeal. He ripened, he never withered.

His latest contribution to this Journal—the contribution of last July—ended on a note of hope. He had been trying to form an estimate of the drift of sentiment in the civilised world in regard to peace and war during thirty-three years. International wars had not ceased. Moltke had not been proved to be wrong when he wrote that perpetual peace was a dream. The lust of territorial aggrandisement and the greed of national predominance had not been banished from the earth. "But," he said in conclusion, "enough has happened, small though it be, to encourage all right-minded persons in all countries to work on for the world's peace with quiet, practical endeavour, and as men not without hope."

A month later, would he have wished to cancel those words? I feel sure that he would not. He was one of those who, as was once said of the Greeks, are always young. And the chief blessing which attaches to those happy natures is that faith and hope never desert them, but remain as constant and supporting companions to the end.

[1] Vol. xiv. p. 416.

THE LEGAL POSITION OF THE DECLARATION OF LONDON.

[*Contributed by* RONALD F. ROXBURGH, ESQ.]

THE Declaration of London, which is dated February 26, 1909, was signed by all the ten Powers represented at the Conference—Great Britain, Germany, the United States of America, Austria-Hungary, Spain, France, Italy, Japan, Holland, and Russia; but it has not so far been ratified by any Power. Much debated, often referred to, its position in the international system of law is not very clear.

The Declaration as a Treaty.—The Declaration is primarily a treaty; but *as such* it has no binding force, because it remains unratified.[1] Moreover, if it ever should be ratified, its contractual operation is so much restricted by Article 66 that cases might arise in which it would not be applicable. "Les Puissances Signataires s'engagent à s'assurer, dans le cas d'une guerre où les belligérants seraient tous parties à la présente Déclaration, l'observation réciproque des règles contenues dans cette Déclaration." It would not therefore be contractually binding in a war in which a third state was one of the belligerents. Such an article as Article 66, and many other similar articles in the Hague Conventions, may lead to strange results: even a stipulation which deals only with a question of maritime law may be inoperative solely because an inland state is not a party to the Convention. Sir S. Evans in his judgment in the "*Möwe*" dealt with this point in connection with the Sixth Hague Convention. Having pointed out that Turkey, Serbia, and Montenegro had not ratified this Convention, he said: "In strictness therefore (apart entirely from the question whether the enemies of this country are acting under or in accordance with the Convention) it is not clear that the Convention is binding or applicable. . . . Of the belligerents, Montenegro has no navy, and, so far as I know, no mercantile marine—it has a coastline, but only of about 30 miles; and Serbia is a purely inland State, having no seaboard at all. It would scarcely seem desirable that the non-ratification by these Powers should prevent the application of the Maritime Conventions."[2] This judgment does not indeed consider how far the Convention may give rise to a customary rule of international law (a consideration which goes far to modify the difficulty under discussion); but the main argument contained in it is even more applicable to the Declaration of London, which is a purely maritime convention, and to which the original signatories are only ten.

The Declaration as an Intended Legislative Act.—But the Declaration

[1] Oppenheim, *International Law*, 2nd ed. vol. i. p. 553. [2] 1915, P. 1, at p. 12.

must be considered, not only as a contract, but also as an intended legislative act of the international community. It is a "law-making treaty," and belongs to that class which "either stipulate new rules for future international conduct, or confirm, define, or abolish existing customary or conventional rules."[1] There has indeed been considerable discussion how far the Declaration aims at establishing new rules of law and how far it is merely declaratory of existing law. The preamble states that "The signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognised principles of international law." This is pointed out by Sir S. Evans in his judgment in the "*Tomini*," where he says, "The belligerent parties agreed to the Declaration; and at the commencement of the Declaration will be found a statement that the rules laid down are substantially in conformity with the law of nations."[2] On the other hand, the General Report presented to the Conference takes a different view: "The solutions have been extracted from the various views or practices which prevail and represent what may be called the *media sententia*. They are not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none. They must not be examined separately, but as a whole, otherwise there is a risk of most serious misunderstandings. In fact, if one or more isolated rules are examined either from the belligerent or the neutral point of view, the reader may find that the interests with which he is especially concerned are jeopardised by the adoption of these rules. But they have another side. The work is one of compromise and mutual concessions."[3] This view is strengthened by Article 65 of the Declaration, which, as would be expected in a case of compromise, provides that the Declaration must be treated as a whole.[4]

However this may be, the Declaration was certainly intended to be a law-making treaty, and although in international law the majority of states have no right to bind a dissentient minority, and therefore such treaties can only be contractually binding on the parties to them,[5] nevertheless they have a tendency to become law for a far larger number of states by a process which is peculiar to the law of nations.

Consent in International Law.—International law consists of those rules which the community of nations have consented to regard as obligatory in their mutual dealings. Consent plays an unusually important part in the law of nations owing to its nature as a legal system. No doubt every system of law depends for its ultimate sanction upon the consent of the persons who are subject to it; but this fact is obscured in municipal law by the existence of a legislature which has power to bind the Courts. Judges are not at liberty to

[1] Oppenheim, *op. cit.* vol. i. p. 23.

[2] 1914, P. 251, at p. 256.

[3] Parl. Papers, 1909, Misc. No. 4, Cd. 4554, p. 34.

[4] See also Smith, *International Law*, 4th ed., by Wylie, p. 226.

[5] Bluntschli, *Le droit international codifié*, traduit par Lardy, 1874, ss. 110, 111; and Alvarez, *La Codification du droit International*, p. 150, take a different view. See also *American Journal of International Law*, 1908, p. 398.

look behind the enactments of the legislative body to discover whether each particular law rests upon the consent of the community. In international law, on the other hand, there is no such legislature, and the consent of the community must be proved in relation to each particular rule.[1] Consent may be given expressly by treaty or tacitly by conduct. Now it often happens that the stipulations of a treaty, besides creating contractual rights and obligations for the parties to them, may give rise to customary rules of law.[2] Third states often come to conform to them, at first perhaps from motives of convenience, and without admitting any legal liability to do so, but afterwards (when the origin of the practice is forgotten), under the conviction that they are legally bound so to act. Thus a treaty stipulation may "by subsequent imitation and adoption, without special stipulation . . . have become a rule of common and consuetudinary international law."[3]

Law-making treaties are especially liable to extend their operation in this manner. The greater states are usually parties to such treaties; and in international law as elsewhere there is a tendency among nations to follow their recognised leaders.[4]

It was expected that the provisions of the Declaration of London would become rules of customary law through states conforming to them in this manner.[5]

The Declaration in the Present War.—During the Turco-Italian war, which was the first naval war after the compilation of the Declaration, although Turkey was not even a signatory party, both belligerents adhered to its stipulations.[6] But the practice of the present war seems to have been very different. By Order-in-Council dated August 20, 1914, the British Government defined its attitude to the Declaration:

> WHEREAS the Governments of France and Russia have informed His Majesty's Government that during the present hostilities it is their intention to act in accordance with the provisions of the . . . Declaration of London, . . . so far as may be practicable,
>
> NOW THEREFORE . . . it is hereby ordered, that during the present hostilities [it] . . . shall, subject to the following additions and modifications, be adopted and put in force by His Majesty's Government as if the same had been ratified by His Majesty.

The additions and modifications which are set out in this and subsequent Orders are of a far-reaching nature.

[1] "L'empire de la coutume est . . . beaucoup plus étendu dans le droit international que dans le droit privé, précisément parce que, pour le droit international, il n'y a pas de législation commune qui vienne restreindre cet empire, en formulant par écrit la règle de conduite."—Pradier-Fodéré, *Traité de droit international public*, vol. i. p. 87.

[2] Cf. Smith, *op. cit.* p. xi.

[3] Reddie, *Researches in Maritime International Law*, vol. i. p. 8; cp. also G. F. de Martens, *Précis du droit des gens*, Introduction, s. 7; and Alvarez, *op. cit.* p. 148.

[4] Pitt Cobbett, *Cases and Opinions on International Law*, 3rd ed. vol. i. p. 11.

[5] *E.g.* by Oppenheim, *op. cit.* vol. ii. p. 360; Lawrence, *The Principles of International Law*, 4th ed. p. 51.

[6] Oppenheim, *op. cit.* vol. ii. p. 360.

It is important to notice that this Order merely amounts to a statement of intention, and further that it only declares an intention to put the Declaration in force subject to additions and modifications. This is in contravention to Article 65 of the Declaration, which stipulates that "The provisions of the present Declaration must be treated as a whole, and cannot be separated." Indeed, the essential feature of a compromise is that a concession made in one case is compensated for by an advantage gained in another, and it would seem that an attempt to give effect to some parts only of a compromise could have small prospect of success. The progress of the war has brought to light a marked tendency on the part of all the belligerents to recur to the strictest rules of their former practice. Sir Edward Grey, in his note to the United States of February 10, 1915, foreshadowed a change in the attitude of the British Government upon many matters, some of which fell within the provisions of the Declaration of London, and with reference to the rules contained in it concerning the proof of destination of contraband, wrote: "An attempt was made some years ago, in the unratified Declaration of London, to formulate some definite rules upon this subject, but time alone can show whether the rules there laid down will stand the test of modern warfare."

By an Order-in-Council published on March 15, 1915, Great Britain, with the concurrence of her Allies, after reciting certain illegal acts of Germany, and declaring that such acts gave her an unquestionable right of retaliation, prohibited commodities of any kind from entering or leaving Germany. It seems probable that during the rest of this war maritime commerce and warfare will be governed by emergency rules, which are to be justified as acts of reprisal; it cannot therefore be said that the Declaration of London is in process of being adopted as customary international law. The blame for this relapse does not rest upon belligerents alone. The success of a compromise of this kind depends upon an approximate balance of political power between belligerents and neutrals; such a balance no longer exists.

It would be lamentable, however, if the special circumstances of the present struggle should leave the Declaration, as has been feared,[1] "a monument not of what the law is but of what the law is not." It was an attempt by a chosen body of jurists belonging to the principal maritime nations to establish harmony and certainty in the place of conflicting and uncertain practices. The Declaration was open to serious objections from both a political and legal point of view; experience has shown that some of its provisions are not adapted to the circumstances of modern warfare; but its object was a laudable one.

However this may be, the Declaration has not so far become operative as a contract or originated new rules of customary international law. It must be considered only as marking a stage in the development of international law, and as a basis for new and revised conventional rules in the future.

[1] Smith, *op. cit.* p. xi.

THE ADHESION OF NON-CHRISTIAN COUNTRIES TO THE HAGUE CONVENTIONS OF PRIVATE INTERNATIONAL LAW.[1]

[*Contributed by* NORMAN BENTWICH, ESQ., *Lecturer at the Khedivial School of Law, Cairo.*]

Hague Conventions on Private International Law.—At the Hague Peace Conferences which have codified the public international law, the representatives of the non-Christian countries, of Turkey, Russia, China, Japan, Siam, etc., have taken their places by the side of the delegates of the Christian Powers. And the Conventions which were signed at these Conferences apply to the whole of the civilised world, irrespective of race and religion. But to the Hague Conferences of 1896, 1902 and 1905, which were called for the purpose of formulating an agreement upon the principle of private international law, the non-Christian Powers were not invited. Further, it was provided in the concluding articles of the Conventions that they apply only to European territories of the contracting States, although provision is made in the Conventions relating to Civil Procedure and Marriage Property that a signatory Power may extend the application of the Treaty to its territories, possessions, or (by giving notice to the other Signatories) colonies situate outside Europe, or to its consular jurisdictions in foreign States. It is important, however, to notice that the Court of Appeal for Algiers has held that Algeria is included in the European territories of France within the meaning of the Hague Convention on the Validity of Marriages (Art. 9), and therefore it would seem that all the Conventions might be held to apply there (see Dalloz, *Jurisprudence Générale*, 1909, ii. 252). Algeria is counted as a French Department, and the French Codes have a larger sway there than in the other French colonies, while the French Civil Courts have normally jurisdiction there in questions of personal law as well as in other matters of civil law. There was therefore no difficulty in extending the application of the rules to this appanage of European France, and no notification of their enforcement in the Colony has been made to the other contracting Powers. In no case, indeed, have the Powers hitherto taken advantage of the provision for extension, and consequently the Conventions

[1] This paper was written in the first half of 1914 for the meeting of the International Law Association which was to take place at the Hague in the summer of last year. Many of the statements made in it have been rendered obsolete by subsequent events, especially in Egypt and Turkey, but the editors have thought it desirable to print it in its original form, together with a postscript as to the régime which may be instituted at the end of the war.

do not apply outside Europe and Algeria. In considering the enlargement of the operation of the Hague Conventions it is then worth while to examine the possibility of the adhesion of the non-Christian Sovereign Powers as well as the application of the rules to the colonies of the European Powers and to the countries where those Powers enjoy the benefits of capitulations and extra-territorial jurisdiction. The countries that fall within the first category are Japan, China, Turkey, Siam, and Persia; the countries that fall within the second are the French colonies and possessions in North and West Africa and Eastern Asia, the new Italian colony of Libya, and the various German possessions in Africa; while lastly the consular jurisdictions to which the Conventions might be applied are those of the chief European Powers in the Ottoman Empire including Egypt, and in the territories of the non-Christian Sovereign States save Japan. Should England and the United States give in their adhesion to the Treaties, these territories would be considerably increased. The effect of such an extension would be to secure uniform rules for the solution of questions of private international law touching the personal status and family rights which arise in these countries as well as in the Christian States of Europe. And the general adoption of the Convention relating to Civil Procedure would equalise everywhere the conditions of litigation for native and foreign subjects and facilitate legal proceedings which involve steps in different jurisdictions.

Adoption of Procedure Convention in Colonies and Possessions.—To deal first with the latter Convention, its adoption in the colonies and possessions of the European Powers such as Algeria and Libya would serve the same useful purpose as in the European States, nor does there seem any reason in principle against the adoption. In the non-Christian independent States, save Japan, however, there exist special jurisdictions for suits affecting foreign subjects which to a great extent secure that equalisation of the foreigner's juridical rights that is the object of the Hague agreement. And on this ground the adoption of the Convention may be considered unnecessary. But it is notable that at present the rights under the Convention are not enjoyed by the subjects of the contracting States before their respective Consular Courts in the Levant and other places where exterritorial jurisdiction is exercised. Thus it was held by the Dutch Consular Court of Smyrna that a Belgian company which sued before it a Dutch company was bound as a foreign plaintiff to give security for costs because the exemption from the duty to give such a *cautio judicatum solvi*, which was secured between Belgian and Dutch subjects by the Hague Treaty of 1905, had no application outside Europe (Clunet, *J.D.I.P.* 1912, p. 1244). This result is juridically anomalous; but as things are, the Consular Courts of the European Powers in the East apply somewhat different rules of private international law to the cases which come before them from those which are applied by the tribunals of their country in Europe in regard to questions both of personal law and of jurisdiction and procedure.

The only non-Christian State in which there might be a question of adhering to the Convention is Japan. There the European Powers accept the exclusive jurisdiction of the national Courts over their subjects who have litigation in this country, and that being so, there is no logical reason why Japan should not be invited to come into the general agreement between States, so as to place European subjects in Japan on an equal footing with natives before the Courts and to place Japanese subjects litigating in Europe on the same footing as any other foreigners. In principle the Civil Procedure Convention is designed for universal adoption, and the considerations of religion and race have no place in it.

Family Law in Japan.—The question of the adhesion of non-Christian Powers to the conventions about family law is more complex. There are fundamental differences of standpoint towards matters of personal status and family law between Christian and non-Christian communities, and it is for that very reason among others that the European States have obtained extra-territorial jurisdiction in Asia and Africa. Yet in the case of Japan again the law of marriage is based on the same principle as European law, and therefore Japan might reasonably be a party to the Hague Conventions which regulate the celebration of marriage, divorce, and the régime of matrimonial property. Japan is, and always has been, a monogamous country. In accordance with the trend of the most modern systems a minimum of formality is required for a valid marriage, and the legal arrangements as to marital property are not radically dissimilar from those found in European Codes. A foreign Court therefore might well apply to Japanese parties before it their national law of marriage, while doubtless the Japanese Court would be willing to apply to foreign parties before it the rules as to jurisdiction and law which are contained in the Hague Conventions.

Principles of Application to Colonies.—The principles by which family law is governed in the colonies and possessions of the European States are, however, very different from those which reign in the mother country. In France and Italy, for example, capacity, marriage rights, and succession rights depend primarily on the national law of the parties; and the Hague Convention normally adopts the national law as the basis of its rules. But in Tunis and Tripoli such rights are not determined for the whole population simply according to a single national law. A part indeed of the community may enjoy the national law of the sovereign State for the determination of its family relations. But certain sections enjoy a different law of their own, determined upon a religious or racial basis. Thus the Mohammedans and Jews of these countries maintain in large part their special system of law for the relations which are dealt with by the Hague Conventions, tutorship, marriage, divorce, and the regulation of marriage and property. If a member of these communities enter into a juridical relationship with a person of foreign nationality the rule of the Hague Convention, being based on nationality, would not directly provide a solution to a conflict of law which might arise. Supposing

A., an Algerian Mohammedan, marries B., an Italian Christian woman, and afterwards sues for a separation in an Italian Court in Tripoli, the Hague rules in their present form would not indicate the right law to apply or the proper jurisdiction for dealing with the suit. The law of the husband in such a case is not the French national family law contained in the Code Civil, but the Mohammedan personal law found in the Sharia, and it is by that law that he would claim a separation. By agreement between the signatory Powers, the term national law might be extended to include the personal system which according to the law of the country is to be applied to a particular individual, and by this extensive interpretation the Hague Conventions could be fitted for a larger sphere of operation. On the other hand, special rules might be added to the present Conventions to cover the case where a peculiar personal system of law modified the application of a national law for one or both parties. It may be objected that the personal system of law applicable to the members of these communities may contain dispositions as to the rights of marriage, divorce, or tutorship contrary to the public order of another country that is a signatory of the Hague Convention, which would therefore be unwilling to give effect to it through its Courts. Possibly the exclusive restriction of the Hague Conventions to the European territories was inserted to avoid difficulties of this character. Suppose, for example, a Tunisian Mohammedan has married first a Tripolitan Mohammedan woman, and, as he legally could, had subsequently married an Algerian Mohammedan woman. Subsequently with his two wives he came to live in Italy, and on his death there a dispute arose as to the right of the wives in his property. The Italian Courts might refuse to exercise jurisdiction on the ground that polygamous marriages were opposed to the public order of the State, and no claims arising out of them could be entertained by the tribunal. But this attitude becomes the less reasonable as the chief European Powers obtain rule in Mohammedan countries and permit the exercise in these countries of the Mohammedan system of law. If in Tunis and Tripoli the French and Italian courts recognise rights of marriage or divorce according to the special law of the religious communities, then the Courts of those States in Europe cannot reasonably refuse to recognise similar rights which are disputed before them by members of those communities. It is more repugnant to the public order that Mohammedans should have one law applied to them in the colony and another in the mother-country, than that there should be different laws as to marriage and divorce for different sections of the people in the same territory in Europe just as there is in North Africa. Upon considerations of public order there is no sound reason, it is submitted, for not widening the sphere of the Hague agreement to cover the colonies of the signatory Powers. As to the effectiveness of the present Hague rules to the conditions of family law which pertain in the Mohammedan countries it would doubtless be necessary, as suggested above, to remodel the provisions as to the capacity for marriage and the forms of marriage celebration so as to

secure the regard for the requirements of the non-national systems of law, wherever such a system regulates the rights and liabilities of a party.

The Dahir or decree issued by the French Government for the regulation of questions of private international law by the tribunals in the protectorate of Morocco is very interesting in this connection. The decree contemplates the disappearance of consular jurisdiction in Morocco and provides for the adoption of the national law of the parties as the normal rule for regulating personal rights. Most of the rules are derived from the Hague Conventions, but certain modifications are made by way of excluding the law of the domicile as regards the substance and the rule *locus regit actum* as regards the form of an act changing personal status. Those qualifications of the supremacy of the national law are admitted in the Hague Conventions in certain cases, but it was felt that they would be dangerous in a country in which the law of the domicile or the *locus* was Mohammedan law which European subjects should not be allowed to invoke so as to change their personal rights and obligations towards each other. The decree suggests that the Hague rules may well become the basis of a body of private international law applicable in non-Christian countries, but that they will require considerable revision to be suited to that larger purpose.

Coming now to the non-Christian countries which, though not subject to European sovereignty, are not independent of foreign jurisdiction, because the chief European Powers possess therein consular jurisdiction, the position is further complicated by the existence of special Courts of personal statute, as they are called. In Turkey, Egypt, Persia, China, and Siam, the tribunals which determine the personal law for foreigners are consular Courts of their own country applying their own national law; and the Courts which determine the personal law for the native subjects are religious tribunals applying the religious law, the Sharia for Mohammedans, the Byzantine canons for certain Christian Churches, the Rabbinical codes for the Jews. Many of the rights of strangers which are secured in European States by the Hague agreements, *e.g.*, the determination of capacity according to the national law, have been enjoyed by foreigners in these countries for a long period in virtue of Capitulations or similar treaties. When the parties belong to the same foreign nationality or religious community, conflicts of jurisdiction are thus avoided, but conflicts may and do arise in these countries when this is not the case. It is suggested then that the adoption of the Hague Conventions in a modified form by the European Powers for their extraterritorial jurisdictions would furnish a more satisfactory solution of conflict of laws than is at present obtained by judicial discretion acting upon general principles, which may vary according to the origin and knowledge of the judge. An illustration of the problems suitable for determination by the Hague rules in some revised form may be found in a recent case which attracted much attention in Egypt.

The case *Hussein Pasha Moharem, etc.*, v. *Solomon Sasson & Co.* (which is reported in Clunet, *J.D.I.P.* 1914, p. 643) turned on the claim of an

Egyptian Mohammedan princess to dispose of part of her property after she had been declared a prodigal and placed under curatorship by the Mohammedan Court of personal statute. She had subsequently married a Russian subject at St. Petersburg, who in order to contract the marriage had been converted from the Orthodox to the Lutheran Church. The marriage, according to the Russian law, was valid, and by the Russian law the wife acquired the husband's nationality. Hence, it was argued before the Mixed Court in Egypt in a suit as to the validity of a disposition of property by the princess, that, as she had ceased to be of Egyptian nationality and subject to the Mohammedan Court of personal statute, her incapacity to dispose of her property disappeared, and the transaction was good. Against this it was said that the marriage of the princess with the Russian Lutheran was altogether null because the personal law of the woman made her incapable of contracting marriage with anybody but a Mussulman, and therefore she remained an Egyptian, and the effect of the interdiction continued. The Mixed Court of Appeal at Alexandria, which had eventually to pronounce upon the action, upheld the contention of the curator of the princess and pronounced the disposition invalid. The considerations on which the Court based its decision may be summarised as follows: The essential point to determine is whether the alleged marriage has changed the nationality of the princess, and that question depends on the capacity of the parties to the marriage. The Civil Code of Egypt provides that capacity is regulated by the law of the nationality to which the person who contracts belongs, and this principle may be extended to marriage. The Egyptian rule would then agree with Art. 1 of the Hague Convention of 1902 for the regulation of conflicts of law in cases of marriage. That Convention is not an authoritative source of law either for Egypt or Russia, since the Government of neither country subscribed to it. At the same time it has great persuasive force, and its ruling may reasonably be adopted in the present case.

From this judgment it appears that the Hague rules are already coming to be treated as a kind of common law, a *jus gentium* for questions of conflict of law and jurisdiction. If an attempt were made to extend them formally to countries outside Europe by inviting the participation of non-Christian countries in a fresh redaction, and by the insertion of such modifications as are required to fit them for the circumstances of the colonies and possessions of the European signatories, they might become a truly international convention, the first instalment of a uniform system of private international law which will surely be the work of jurists of this century. And it would be among the great benefits of such an extension that it would secure for members of non-Christian communities living in Europe some reciprocity of treatment with the privileges which members of European countries enjoy in the non-Christian countries. The existing absence of that reciprocity is one of the blots on the jurisprudence of our Imperial nations, a point in which it is notably inferior to the jurisprudence of the

Roman Empire, in which each national community possessed a legal autonomy for matters of personal law. The equality of systems of law should be as fundamental an axiom of the society of races and peoples as the equality of States is with the society of nations.

P.S.—Since this paper was written, the great conflict of nations has broken out and has called into question the whole basis of our international society, and among other consequences has led Turkey to denounce the Capitulations and England to put an end to Turkish suzerainty in Egypt which must involve eventually the disappearance of the capitulatory jurisdictions in that country. But however severely the fabric of public international law is shaken, and however completely the rules of private international law are for a time suspended, there is no reason to believe that the Hague Conventions, at least of private international law, will not resume their sway when the war is over. They will, however, probably require to be recast: for several of the signatory Powers had already found some of their provisions unsatisfactory and inadequate. France last year denounced those which regulated questions of marriage, divorce, and matrimonial property, desiring to resume the liberty which she had under her former national rules. If England and America would take part in a gathering for the revision of the Conventions, it should be possible to secure a fuller recognition of the principle of domicile as an alternative to the sway of the national law over personal relations which is at present consecrated by the European practice. And the Conference called for the work of revision would further be able to study the possibility of fitting the international regulations for the countries of the Mediterranean littoral, which will probably all be under European sovereignty and inhabited by a considerable European population continually coming into relations involving problems of private international law. A consideration of non-national religious systems of law will then be required. The need for the adoption of definite international rules for the solution of conflicts of private law will be the greater if the special extra-territorial Courts are swept away in the whole of what was the Ottoman Empire including Egypt; and the Hague Conventions in a modified form offer the best means to this end. This recommendation therefore of a complete or partial acceptance of the Hague rules outside Europe is rather strengthened than weakened by the events of the last year. And though the immediate task of the world's jurists when peace is restored will be to restore the breaches in the public law, the extension of the system of international conventions for the regulation of private rights will be an urgent need in the new division of nations and jurisdictions which will emerge from the war.

THE RELATION OF ADVERSE POSSESSION TO REGISTRATION OF TITLE.

[*Contributed by* James Edward Hogg, Esq.]

It is proposed in this paper to deal with the question of the relation between title to land by adverse possession, and title to the same land under registration or State guarantee, by considering two things: What are the actual rules on the subject embodied in the various systems of registration of title, and whether there is any sound juridical theory to be extracted from the rules. Where land is placed on a register, and a State guarantee given in respect of the registered ownership, does the guarantee extend to the protection of the registered owner against claims based on adverse possession by which title can be gained under Statutes of Limitation?

One short answer to the question put in this form is that in some systems the registered owner is protected and in others he is not. The proper answer can only be given through the medium of the discussion into which it is now proposed to enter.

Systems of Registration of Title.—Taking registration of title to mean a system under which title to land or interests therein not only passes by registration, but is guaranteed in some manner by the State to the owner on the register, there are in the British Dominions (including the protectorates) no less than twenty-seven systems of registration of title. The number of territorial units in which these statutory systems are in force is thirty, the same system applying in some instances to more than one territorial unit. The New South Wales system applies to the Canberra territory, the South Australian system to the Northern Territory of Australia, and the Canadian North-West Territories system to the district of Yukon. It will be unnecessary to refer further to these three smaller territorial units, and the number of systems in the Empire may be taken as twenty-seven.

Distinctions between Systems.—These twenty-seven systems may be divided into three groups. In eight systems the right of acquiring against the registered owner a title by length of possession under Statutes of Limitation is preserved by express statutory enactment. In nine systems this right of acquiring title by possession is expressly abrogated and the registered owner protected. In ten systems the statutes are silent as to the effect of adverse possession, and judicial decision—though not unanimous—is largely in favour of the view that a title by long possession can be gained

under the Statutes of Limitation against the registered owner. This division into groups of eight, nine, and ten respectively is not quite correct, for some jurisdictions might be placed in two groups, registration being superior under some circumstances and adverse possession in other circumstances in the same system. This happens where titles may be registered as "absolute," or as "possessory," and also in Ireland, where a distinction is made according as the adverse possession begins before or after first registration.

Title by Adverse Possession against Registered Owner.—The first group of eight, expressly permitting title by adverse possession to be acquired as against a registered owner, consists of Victoria, Western Australia, Fiji, Federated Malay States, Sudan, Jamaica, Leeward Islands, England.

Of these eight systems two only (Fiji and Federated Malay States) are exactly alike on the point under discussion. In Victoria[1] the title of every registered owner is subject to "any rights subsisting under any adverse possession of" the land, and it is also enacted that "a title to an estate of fee simple in possession . . . can be acquired by possession adverse to or in derogation of the title of the registered proprietor," under the Statute of Limitations, and a declaratory order can be obtained accordingly. In Western Australia[2] the law is substantially the same as in Victoria, though the enactments take a different form. In Fiji[3] and the Federated Malay States[4] a registered title is "subject to challenge . . . on the ground of adverse possession in another for the prescriptive period." In the Sudan[5] the statutory "provisions as to registration shall not affect the right to acquire a title to land by prescription." In Jamaica[6] the registered title is "subject to . . . any rights acquired over such land since the same was brought under the operation of this Law under any Statute of Limitations." In the Leeward Islands[7] the registered title can be "challenged" as having been "superseded by a title acquired by prescription"; the register may thereupon be rectified, but until rectification the newly acquired title cannot be actively asserted. In England[8] "a title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession"; but an adequate length of possession will confer a right to have the register rectified, though this right will be ousted if the registered proprietor has dealt with the land for value in favour of persons who have duly registered their

[1] Transfer of Land Act, 1890 (No. 1149), s. 74; Transfer of Land Act, 1904 (No. 1931), s. 10. The latter enactment gives statutory efficacy to what had already been decided by the Courts. See *In re Allen*, (1896) 22 V.L.R. 24.

[2] Transfer of Land Act, 1893 (56 Vict. No. 14), ss. 68, 222.

[3] Real Property Ordinance, 1876 (No. 7, 1906 ed.), s. 14.

[4] Registration of Titles Enactment, 1911 (No. 13), s. 8.

[5] Title of Lands Ordinance, 1899 (No. 2), s. 14.

[6] Registration of Titles Law, 1888 (Law 21), s. 55.

[7] Title by Registration Act, 1886 (No. 2), ss. 10, 45, Sched. of definitions—"Indefeasible."

[8] Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 18, as amended; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 12.

interests. In the case of the Leeward Islands and England registration with either "absolute" or so-called "possessory" title is provided for, but the effect on adverse possession of the limited guarantee given by "possessory" registration need not be further considered here.

Enforcement of Right of Adverse Possession.—It will be noticed that of the eight systems in which adverse possession is made a root of title as against the register, only in four—Victoria, Western Australia, Leeward Islands, and England—is definite machinery provided for putting the adverse possessor on the register in the place of the person ousted of his registered title. It will also be noticed that in only one case—England—can the inchoate rights of a person in adverse possession be ousted by the registration of a successor to the registered owner against whom a title under the Statutes of Limitation is being acquired.

Protection against Abrogation of Title by Adverse Possession.—The second group of systems (nine in number)—expressly protecting the registered owner against abrogation of his title by means of adverse possession in another person—consists of New South Wales, South Australia, New Zealand, Manitoba, British Columbia, Ontario, Nova Scotia, Ceylon, Ireland.

The enactment in New South Wales is [1]: "No title to land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any Statute of Limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute."

This enactment stands without any proviso or modifying clause in any other part of the statute. The enactments in South Australia,[2] New Zealand,[3] Manitoba,[4] and British Columbia,[5] though substantially to the same effect, have each to be read with another enactment making the registered title "void" against persons in adverse possession and "rightfully entitled" at the time of first registration. In Ontario [6] and Nova Scotia [7] the enactments are identical, and are in the words of s. 21 (now repealed) of the English Act of 1875, preserving the rights of persons in possession at the time of first registration when the title registered is "possessory" only. In Ceylon [8] the enactment, though to the same effect as those already cited in ousting title by mere possession, is subject to other provisions enabling all adverse claims

[1] Real Property Act, 1900 (No. 25), s. 45.
[2] Real Property Act, 1886 (No. 386), ss. 69 (vi.), 251.
[3] Land Transfer Act, 1908 (No. 99), ss. 61, 73.
[4] Real Property Act (R.S. 1913, c. 171), ss. 82, 83.
[5] Land Registry Act (R.S. 1911, c. 127), s. 22.
[6] Land Titles Act (1911), 1 Geo. V. c. 28, s. 29.
[7] Land Titles Act (1903-4), 3 & 4 Ed. VII. c. 47, s. 42.
[8] Land Registration Ordinance, 1907 (No. 3), ss. 59-65. This Ordinance, however (an amending and consolidating one), has not yet been brought into operation. In the edition of 1913 the repealed Ordinances are printed along with that of 1907, and these do not contain s. 59, by which title is not to be "acquired by any length of possession."

standards and is supplemented by a syllabus on Scripture lessons adapted in the same way.

MISCELLANEOUS ORDINANCES.

Hospitals and Charitable Institutions.—No. 7 amends the Ordinance of 1912.

Public Holidays.—No. 6 amends the Public Holidays Ordinance (No. 34 of 1905).

3. NATAL.

Ordinances passed—11.

With the exception of Ordinances effecting small amendments and making financial provision the legislation is for the most part of a local and personal character.

Education.—No. 7 provides a system of retiring allowances for teachers for whom no provision for pension or superannuation is made under any other law.

Motors.—No. 11 provides for the registration of motor-cars and the licensing of motor-car drivers. Fourteen is the minimum age for the rider of a motor-cycle and seventeen for the driver of a motor-car or cycle-car. Steps are taken to secure before the issue of a licence that the recipient is competent to hold it, "and whenever practicable the examiners of an applicant for a licence shall include a member of a recognised automobile club." Convictions for driving at excessive speed cannot be obtained "upon the evidence as to rate of speed of one witness only, or if such evidence be based only upon opinion and not supported by measurements as to time and distance."

4. ORANGE FREE STATE.

Ordinances passed—9.

Motor-Cars.—No. 3 provides for the registration of motor-cars and the certification of motor-car drivers.

Local Government.—The whole of five Ordinances and the greater part of eight others are consolidated in No. 4, which is the longest Act of the session. It deals with the constitution and powers of local authorities, and its general provisions do not require detailed description. One detail may be noted. To the clause prohibiting councillors to contract with the council is added a provision that councillors may not act directly or indirectly as advocate, attorney, or law agent in any action by or against the council.

Hospitals.—No. 8 is a comprehensive Ordinance dealing with the establishment, maintenance, and management of public hospitals and kindred charitable institutions in substitution for the Act of 1908.[1] Hospital Boards

[1] No. 38 of 1908. See Journal, vol. x. p. 364.

"absolute." With respect to "absolute" title, the law appears to be the same substantially as in South Australia or New South Wales, according to circumstances—a title already complete under adverse possession would enable the person holding it to claim either the land itself or compensation based on its value.[1] Although a "possessory" title in Ontario and Nova Scotia will not of itself prevail over any rights under adverse possession subsisting at time of first registration, a line appears to be so far drawn by first registration as to prevent adverse possession which commences after first registration from ever ripening into a title. Ceylon is the last of the group of nine jurisdictions to be here referred to. Although adverse claimants have one, two, or four years within which to prosecute their claims, yet, when once the registration does become effective by barring adverse claims, the bar is complete against all claims, and no rights under adverse possession can ripen into title.

Absence of Statutory Enactment.—The third group of ten systems has now to be dealt with, in which the statutes themselves are silent as to the effect of adverse possession upon the registered title. These ten systems are: Tasmania, Queensland, Papua, Saskatchewan, Alberta, North-West Territories, British Honduras, Trinidad and Tobago, Uganda, East Africa.

In only one of these is the question of any possible conflict between the registered title and title by possession referred to in the statutes. In Tasmania[2] the registered title is "void" as against persons in adverse possession and "rightfully entitled" at the time of first registration, as in South Australia, New Zealand, Manitoba, and British Columbia.[3] Apart from this enactment, the question of the effect of possession under Statutes of Limitation is left open, so far as statute law is concerned, in Tasmania just as in the others of these eleven jurisdictions. The enactment does, however, imply that all merely inchoate rights under adverse possession are wiped out by first registration, and a line drawn by the registered title so that these inchoate rights cannot ripen into actual title. This has been decided to be so by the Tasmanian Courts. But with respect to adverse possession commencing after first registration, the Statutes of Limitation are held to apply, and the statutory period begins to run afresh against each successive registered owner from the date of his registration.[4] Thus, to use a common metaphor, in Tasmania first registration, and every subsequent registration of another person, "wipes the slate clean," but does not keep it clean, with respect to adverse possession under Statutes of Limitation.

Whether the registered or guaranteed title can or cannot be ousted by a

[1] Ontario—Land Titles Act (1911), s. 124. Nova Scotia—Land Titles Act (1903-4) ss. 85, 86.

[2] Real Property Act, 1862 (25 Vict. No. 16), s. 135.

[3] *Supra*, p. 85.

[4] *Featherstone* v. *Hanlon*, (1885) Badger's Digest, 4; *Re Bartlett*, (1907) 4 Tas. L.R. 26; *Burke* v. *Lock*, (1910) 6 Tas. L.R. 73.

poundmasters, the impoundment of stock, the fees, and the disposal of impounded stock.

Shop Hours.—6.30 is fixed by No. 9, consolidating previous legislation, as the hour for closing shops, except Wednesdays (1 p.m.) and Saturdays (7 p.m.). In certain urban areas shops may be kept open until 9 p.m. on Saturdays. When Sunday follows or precedes a public holiday, vendors of viands may open until 9 a.m. on the second of the days. On December 25 and December 31 shops may be open until 11 p.m. unless the day be a Sunday, when the permission applies to the preceding day. For each year of continuous service a shop assistant is entitled to leave of absence for twelve clear working days in a consecutive period, or fourteen if the shop opens on Sundays, provided that the employer may fix the time of leave for the different shop assistants with reasonable regard to the exigencies of his business; provided further that, unless the employer shall have granted to any shop assistant his period of leave at an earlier date, the said leave shall be granted within one month of the termination of any year's continuous service. There are the customary exemptions for places of refreshment, chemists', and other shops.

6. SOUTHERN RHODESIA.

Ordinances passed—17.

Transfer of Businesses.—By No. 4, whenever there is a change in the style, constitution, personnel, or premises of a business, a notice of it is to be advertised within fourteen days in three issues of the *Gazette* and a local newspaper of the district where the business is carried on. No business which has been transferred shall continue to be carried on under a licence in the name of the transferor.

Prevention of Corruption.—No. 7 deals with secret commissions upon the lines of English legislation.[1]

Fires.—Precautionary measures are enacted in No. 9 to prevent the spread of fires. A zone known as a fire-guard may be created on the petition of an actual majority of owners or occupiers along the common boundary of not less than 15 feet on each side as prescribed by the Administrator. The operation known as "counter-firing" for the protection of life and property is authorised by the Ordinance.

Miner's Phthisis.—No. 10 prohibits the employment of persons suffering from miner's phthisis, or tuberculosis of the lungs or respiratory organs, in mines.

Water Rights.—No. 13 composes the whole law relating to the use of water, the constitution and financing of irrigation boards for combined irriga-

[1] 1 Ed. VII. c. 34. See *Legislation of the Empire*, vol. i. p. 135.

his claim, or is entitled to claim indemnity for loss of his property. On the whole, it appears to be in accordance with sound principle, and not inconsistent with the positive provisions of the statutes now under discussion, that the first registration of land should at once abrogate all rights—complete and incomplete—under adverse possession.

If the conclusion here arrived at is sound, there would seem to be no difficulty in extending the principle of it so as to cover the case of registrations other than the first—*i.e.* upon dealings for value duly registered—so as to make each fresh registration conclusive against adverse possession. Title by adverse possession would thus accrue only as against a registered owner who had remained for the whole statutory period out of possession and without entering into any registered transaction for value.

The rule of law here suggested as the result of the cases from British Honduras and Alberta is substantially identical with that laid down in Tasmania. There is an approximation to this rule in the statutes of England and Ireland, and in a less degree in the statutes of Jamaica and the Leeward Islands. Other statutes are wider of the mark, opposite extremes being reached in enactments of which those of New South Wales and Victoria are respectively typical. The New South Wales type—simply prohibiting all acquisition of title by length of possession—must eventually prove unworkable, since under such enactments land might remain in perpetuity as the registered property of a person who had long since abandoned all claims to it. The Victorian type—making the registration possibly void against a *bonâ fide* purchaser from a registered owner—seems to trench more than necessary on the vital principle of guaranteed title.

Proposed Amendment of Law.—It is suggested that the following propositions—here thrown into the form of a section in an Act of Parliament—represent a rule of law which would be at once convenient and in accordance with sound juridical principle:

1. *A title to registered land shall not be acquired by any length of possession.*

2. *Where a person would but for the preceding sub-section have acquired a title to registered land by length of possession subsequent to first registration and exclusive of any possession prior to first registration, he may apply to be registered as owner of the land in place of the then registered owner, and the register may be rectified accordingly.*

3. *No such right to rectification shall arise unless such length of possession has subsisted subsequently to the latest registration of a transaction for value with the land and exclusively of any possession prior to such latest registration.*

4. *The last preceding sub-section does not apply in any case where no transaction for value has been registered.*

5. *This section does not apply to land registered with possessory title only.*

PRIZE LAW.[1]

[*Contributed by* R. G. Marsden, Esq.]

Sources of Prize Law.—The prize law of England has been made almost wholly by the Crown in exercise of its prerogative, which does not seem to have been materially affected by disuse or lapse of time, or by the legislature. Political considerations have always influenced the sovereign in the exercise of his powers, which before the Stuart period were practically unlimited; at the present day the rights and claims of neutrals will probably receive more consideration than they have in the past, but a more definite limit upon the power of the Crown now is the law of nations, which has been said to be part of the law of England. Further limits may have been imposed by treaty, convention, arrangement, or statute. No statute has been passed expressly interfering with the power of the Crown in prize matters, but indirectly and in minor matters it may have been affected. Amongst the Acts which require examination are the Act constituting the Judicial Committee of the Council as the Court of Appeal from the Admiralty, the Naval Prize Act of 1864, the Naval Discipline Act of 1866, the Prize Courts Act of 1866, the Judicature Act, the Prize Courts Act of 1894, the recent Emergency legislation, and possibly some colonial Acts. The ancient right of pillage was abolished by an Act of 1692,[2] after having been expressly legalised in 1661.[3] An Act of 1442,[4] declaring the right of captors to friends' goods in enemy ships, was treated as obsolete and repealed in 1863. Treaties altering or declaring the law as between the contracting parties have been frequent since the fourteenth century; a decision of one of Edward III.'s admirals as to the legality of the capture of some Portuguese goods was affirmed by the king, as being in accordance with a treaty of 1353.[5] In the eighteenth century express reference to treaties was commonly made in letters of marque, and the grantees were directed to act in accordance with them.

Treatment of Neutrals.—It has sometimes happened that the Crown has found reason to give exceptional treatment to the ships of one neutral, and has done this through a diplomatic channel or by the mere declaration of

[1] Most of the earlier unprinted documents (1205-1649) to which reference is made in this article will be printed in a volume to be issued by the Navy Records Society, called "Documents Relating to Prize Law."

[2] 4 Will. & Mary, c. 25.

[3] 13 Chas. II. c. 9, s. 7.

[4] 20 Henry VI. c. 1.

[5] Treaty Roll, 35, m. 11.

its will, and not by public proclamation. Charles I. favoured Hamburg and France in this way, and George II. appears to have done the same to Prussia.[1] Whether a previous proclamation can be varied in this way was doubted in the former case; in the latter Sir Henry Penrice, the judge of the Admiralty, only remarked that the declaration of the king's will had not been brought to his notice, and would be very material in the case.[2]

Procedure of the Admiralty Court.—The High Court of Admiralty grew out of, and early in the fifteenth century superseded, local Courts which were held by the Admirals of the North, South, and West, who were in command of the fleets in those districts. The functions of these local Courts were mainly disciplinary and administrative, but, from the first, questions as to the legality of captures must have come before them, and the exclusive jurisdiction of the Admiralty to decide the question of prize or no prize has remained with the Admiralty Court, almost without question, ever since. An appeal always lay to the king, until it was transferred to the Judicial Committee of the Privy Council; thus the ultimate authority in prize law has always, and still does, rest with the Crown. The judge of the Admiralty was the "lieutenant" of the Lord High Admiral, and received his appointment from him or from the Lords of the Admiralty; this continued to be the practice until the passing of the Judicature Act. The Lord High Admiral was usually, if not always, a member of the Council; and the records of the Court show that the relations between the Council and the judge of the Admiralty were formerly very close. Orders to the judge with reference not only to the law which he was to administer, but to individual cases, were frequent. Sir Julius Cæsar, the first Admiralty judge of eminence, in 1591 complains of an order which he had received for the release of certain neutral ships that had been brought in with contraband on board for Spain, and which he thought ought to have been condemned as prizes according to "the civill and maritime law, the truest and most indifferent judge between all nations," though recognising that it was made for political reasons "far above my poor capacitie."[3] With this may be compared the answer of the Lords of the Admiralty to Sir Thomas Salusbury, who was judge in 1757, as to the character of certain ships, whether they were of war or private; the answer is that he, and not they, is the judge.[4] The recognition of a law of nations, to which the judgments of the Court must conform, appears incidentally in the records during the sixteenth and becomes prominent in the following century. It is perhaps due to this that, whilst the direct interference of the Lord Admiral and the Crown with the judicial functions of the judge became less marked, the practice arose of consulting the judge upon points of law and as to the legality of particular captures. Sir Henry Marten, in Charles I.'s reign,

[1] Adm. Ct. Miscell. 532, f. 85b; P.C. Register, January 17, 1628; Adm. Ct. Libels 88, No. 78.

[2] Admiralty, Sec. In Letters, February 29, 1747.

[3] Add. MSS. 12505, f. 377.

[4] Admiralty, Sec. Out Letters 1056, f. 15.

is the first judge who is found objecting to being called upon to report to the Crown upon cases that were likely to come before him. Subsequent judges were more emphatic in their protests, and more successful in resisting the practice; but it continued to the eighteenth century, and does not entirely cease until the time of Lord Stowell. On the other hand, judges have called attention to acts of the Crown and Orders-in-Council which they conceived to be contrary to the law of nations. The power of the Crown to suspend proceedings in a particular case, or to liberate a ship in the custody of the Court, appears to have been generally recognised; but it was doubted in one case, although the capture was clearly illegal.

Before the seventeenth century a law of nations hardly existed; since then it has been formulated in some directions and altered in others. Practices which in the past, being in accordance with that law, were authorised by the Crown, would now be impossible. On the other hand, an Order-in-Council made to meet new conditions, if in accordance with its principles, would, it seems, not be beyond the power of the Crown.

Statutory Limitation of Powers of the Crown.—As regards the limitation of the powers of the Crown by statute the fact that, since the close of the seventeenth century, Prize Acts have commonly been passed at the commencement of every war does not seem to be material. These Acts, which remained in force only during the wars to which they related, were modelled upon similar legislation of the Commonwealth period. They were passed for the encouragement of seamen and privateers, to whom they gave a statutory right to their prizes, and their purpose was not to limit the power of the Crown, which had, for the most part, been previously exercised in accordance with their provisions. The Act of 1777, during the American war of independence, was called for by the special circumstances. All these Acts largely relate to privateering, a matter which had previously, from 1585 downwards, been dealt with by Instructions to privateers issued by Order-in-Council. Some of the Acts are careful to preserve the powers of the Crown, as in the Naval Prize Act of 1864; this is rather *ex majore cautela* than of necessity. Some of them enact penalties for offences which otherwise could only be dealt with indirectly by forfeiture of the privateer's bond or avoidance of his commission. The almost complete absence from the Statute Book of any other legislation upon the subject indicates the extent of the prerogative in matters of prize. As mentioned above, an Act of 1442 gives friends' goods in enemy ships unprotected by safe conduct to the captor; but this was to prevent the indiscriminate issue of safe conducts rather than to alter the law. The law itself upon the point was declared by an Order-in-Council of 1665.[1] An Act of 1661 contains a few clauses regulating the conduct of captors, and expressly allows pillage; this, as stated above, was afterwards repealed. The practice of bringing in neutral ships and compelling the owners to sell to the Crown cargoes which it was desired to prevent reaching

[1] S. P. Dom. Chas. II. cxiii. 39; Adm. Sec. In Letters 5246, f. 96.

the enemy was begun by Elizabeth. In the eighteenth century it was found that the Navigation Act made it illegal, and an Act had to be passed to make such purchase possible. This Act again made a difficulty, when the goods brought in were found to be of inferior quality and unsuitable for the Navy. The naval authorities tried to escape having to buy, but in 1780[1] Sir James Marriott, the judge of the Admiralty, found himself bound by the Act to order their purchase. But for the Act, the Crown would, no doubt, not have purchased, and in this case its power was inadvertently limited.

Subject's Interest in Prize.—That no subject can take any interest in prize, except by grant from the Crown, is shown by numberless records. Except in a curious case[2] which occurred in the thirteenth century the right of the Crown does not seem to have ever been questioned. In that case the Cinque Ports remonstrated with Edward I. for interfering with some ships which they had captured from the Normans. There was no open war, and the story of the Portsmen was that their ships had been wantonly attacked, and that in defending themselves they had taken the prizes in question. Moreover, they said, the Normans had hoisted the flag called "baucan" or "bausan," which is everywhere known as meaning war to the knife without quarter; when an adversary wears that flag, by the law of England prizes taken from him belong to the captor. It does not appear that the Portsmen took anything by their claim, and no other mention of the "baucan" in this context has been found. The seamen's right of pillage, and a custom by which some of the officers in king's ships took certain perquisites, were indulgences allowed by the Crown rather than exceptions to the general law. *Lucrum belli*, "the gaynes and winnings of werre," and the prize money, gun money, and head money of the eighteenth-century Prize Acts are prominent in the records, and were sharply looked after by seamen, from the Lord High Admirals downwards.

Crown's Power to Amend Prize Law.—The power of the Crown to make and alter prize law, at least so far as it affects British subjects, stands upon the same footing as its right to prize and seems to follow from that right. It has been exercised from very early times. In 1375 Edward III. directed that freight should be paid upon enemy goods in a friend's ship.[3] In the fourteenth and fifteenth centuries many treaties were made dealing with matters of prize. Henry VIII. and Mary issued proclamations upon the subject.[4] In Elizabeth's reign the rights and duties of neutrals were the subject of frequent discussion[5]; contraband and the capture of ships with supplies for Spain were dealt with by Orders-in-Council, and the first Instructions for privateers,[6] which became

[1] Admiralty, Sec. In Letters 3886, July 31, 1780.

[2] Chanc. Miscell. bdle. 29, file 3, No. 7.

[3] Pat. 48 Ed. III. m. 17, d.

[4] Harl. MSS. 442, f. 99; Adm. Ct. Libels 28, No. 59.

[5] Cott. MS. Galba D. iv. vii. viii., Nero B. iv. and ix.; Lansd. MS. 66, f. 237; *ibid.* 67, f. 256; Add. MS. 12505, f. 305; Adm. Ct. Exempl. 34, No. 96; *ibid.* Acts 21, December 29, 1591; Acts P.C. September 15, 1589.

[6] S. P. Dom. Eliz. clxxx. 15.

the precedent for all subsequent Instructions, were issued. In James's reign peace with Spain and war between the Netherlands and Spain compelled the King of England to define his territorial waters and issue stringent and detailed rules to prevent fighting between the belligerents in English waters. This was done by a proclamation which contains the substance of modern law upon the subject, and some of its provisions are in force at the present day.[1] War with France and Spain in Charles's reign called for further changes in, or a clearer statement of, prize law, and all that was done in this direction was done by the King in Council. Even the Admiralty Court, which had not yet established itself as an independent tribunal, was frequently directed how to act in particular cases, and sometimes its process was interfered with by Order-in-Council. But the advent of Grotius and the increased attention which was being paid to the action of foreign admiralties and foreign states obliged Charles to be more circumspect than Elizabeth. Difficulties with foreign Powers caused him to appoint a commission[2] to inquire into and report upon certain disputed questions of prize law, but it does not appear to have issued any report. The law of nations, vague and undefined though it was, was recognised as limiting the action of sovereigns and is frequently mentioned in public documents of this period. For a century before the opinion of the judge and the "civilians"[3] or "doctors," who practised in the Admiralty Court, had been taken by the Council upon difficult cases of prize law.

Since the Restoration the action of the Crown in matters of prize has closely followed the precedents of earlier times. Except that Prize Acts have from time to time been passed, that the practice of direct interference with the process of the Admiralty Court has long ceased, and that, at least since the days of Lord Stowell, the independence of that Court as a tribunal administering a law common to all nations has been established, there appears to have been no alteration in the practice of the Crown with reference to prize and no diminution of its powers. As an example of the application of old forms to a new situation may be mentioned an Order of April 4, 1840,[4] by which Queen Victoria directed the Lords of the Admiralty to require the judge of the Admiralty to condemn any ships of China that should be seized by her ships "with a view to obtain . . . satisfaction and reparation" for injuries done to her subjects by the Emperor of China.

[1] Pat. 2 Jas. I. pt. 32; Rym. xvi. 633.

[2] Rymer xviii. 731.

[3] S. P. Dom. Mary iv. 92; S. P. Dom. Eliz. xxxiii. 18; Lansdown MSS. 115, f. 245; *ibid.* 139, ff. 112 *seq.*

[4] *London Gazette*, June 23, 1840, p. 1492.

[See as to validity of Orders-in-Council, *The Zamora*, *Law Times*, June 26, 1915, p. 189.—Ed.]

NATIVE LAW AND PROCEDURE IN BRITISH WEST AFRICA.

[*Contributed by* MAJOR A. J. N. TREMEARNE, M.A., LL.M.]

Primitive Criminal Law.—Many a European upon his arrival on the West Coast of Africa is inclined to scoff at the conditions of life of the people placed under him, and, naturally so, for everything is so different. When he has once taken the trouble really to understand their codes of morals and their rules of conduct, however, he will find that in many cases the underlying idea is the same as in ours. It strikes him as surprising, and yet it should not do so, for surely human nature is much the same whatever the colour of the skin, or the climate of the country. Our laws are naturally more comprehensive, for we recognise more offences, and, in a civilised country where the criminals are clever, the law has to be more definite. Yet this provision sometimes defeats itself, for, owing to the want of elasticity, an offender may possibly get off on a technical point whereas he would have been caught had the statement of the law been more general.

It is well to remember that in a primitive community, where each one knows the other's business, it is probable that more wrong-doers will be given their deserts than in a country in the stage where, owing to the creation of local courts with negro judges, the cleverness of legal argument upon a technical point may be a more decisive factor in the trial than the justice of the case. The judge must administer the law as it stands, he cannot travel out of the sets of facts exhibited before him or before his predecessors, and even the most justly minded counsel on each side must fight his hardest for his client. The local jurymen and assessors too are apt to be influenced by extraneous conditions, as, indeed has been the case in Ireland more than once, and even in England such a danger was officially recognised by the introduction of the *certiorari* to secure a fair trial, although the writ is hardly likely to be necessary now-a-days.

Theft.—The late Dr. Blyden, a native, says in his *African Life and Customs*, that under the African system of family organisation, no stealing takes place, for the necessity and habit of theft do not arise, since each one has his rights, and each one possesses enough. But however greatly one may respect the writer, one cannot agree with him, for amongst the Head-

Hunters of Central Nigeria, for instance, where something comparable to the joint-family system obtains, cases of theft certainly do occur, and other examples could be given—no doubt, by many officials—while the number of people with hands missing is a sufficient proof that under the Mohammedan rule (which he advocates for West Africa) the offence is not unknown. Very often, the members of one community think it no crime to steal from those of another, and, where theft does not exist within the community itself, the reason is probably that each member considers that he has already a sufficient ownership in the desired article to enable him to use it whenever he wishes to do so. Certainly, the fewer the wants of a people, the less will be the inducement to steal, and it is one of the drawbacks of our colonisation that through teaching the people to want our goods—and so "stimulate trade"—we also teach them to want them too soon and too often. Where every girl wears only a tail (which she herself makes) and some leaves, she may not see much to choose between two suitors for her hand, but when the dusky maidens have become sufficiently civilised to wear European clothes, the youth who is able to make his wife the envy of the village is likely to carry off the prize, and, if he wants her very much, he may not be quite particular about the manner in which he obtains the clothes.

British Regulation of Witchcraft.—It is perhaps rather in the regulation of the adjective law than in the imposition of substantive law that the British occupation has been so beneficial. An interesting example of this is seen in the Ordeal, Witchcraft, and Juju Proclamations—*e.g.* that of Northern Nigeria, No. 16 of 1908. This enacts that—

> Trial by the ordeal of sasswood, esere-bean, or other poison, boiling oil, fire, immersion in water or exposure to the attacks of crocodiles or other wild animals or by any ordeal which is likely to result in death of or bodily injury to any party to the proceeding[1] shall be and is hereby prohibited,

the penalties ranging from a fine of fifty pounds to a sentence of death according to the circumstances. Again:

> Any person who accuses or threatens to accuse any person with being a witch, or with practising witchcraft, shall be liable on conviction to a fine not exceeding fifty pounds or to imprisonment for any term not exceeding six months. Any person who by his statements or actions represents himself to be a witch, or to have the power of witchcraft, shall be liable on conviction

to similar penalties. So also is—

> Any person who makes, or sells, or uses or assists, or takes part in making, or selling, or using, or has in his possession for sale or use any juju or charm which is intended to be used, or reputed to possess the power to prevent or delay any person

[1] For trial by ordeal in Nigeria, see Tremearne, *The Tailed Head-Hunters of Nigeria*, p. 20, and *Hausa Superstitions and Customs*, pp. 139, 140, and 166.

from doing an act which such person has a legal right to do, or to compel any [such] person to do an act . . . which is alleged or reputed to possess the power of causing any natural phenomenon or any disease or epidemic.[1]

The Governor may prohibit the worship of any particular juju and then—

Any chief who directly or indirectly permits, promotes, encourages or facilitates any trial by ordeal which is prohibited by this Proclamation, or the worship or invocation of any juju which has been prohibited by any order made under this Proclamation, or who knowing of such trial, worship or invocation, or intended trial, worship or invocation does not forthwith report the same to a Resident of the province in which such trial, worship, or invocation has been or is intended to be held or made, shall be liable on conviction to a fine not exceeding two hundred pounds or to imprisonment for any period not exceeding three years.

Lastly :

Any house, grove, or place in which it has been customary to hold any trial by ordeal which is prohibited by this Proclamation, or the worship or invocation of any juju which has been prohibited by any order made under this Proclamation, may together with all articles found therein be destroyed or erased upon the order of any court by such persons as the court may direct.

Distinction between Criminal and Civil Actions.—According to the *Annual Report of the Gold Coast* for 1911—

returns of cases heard before native tribunals are not sufficiently accurate for much reliance to be placed on the figures. Native customary law does not generally discriminate between civil and criminal actions, although in some divisions a distinction is drawn.

But why should it be? The lawyer who has had to read any legal history at all—and we all have had to do so—knows that that was the natural condition of things in primitive societies, even in England! Even now—

there is one grave—if not indeed insoluble—difficulty which has to be faced in studying the law of crime . . . it consists of the fundamental problem—*What is a crime?* Clearly the criminal law is concerned with crimes alone, not with illegal acts in general. But how are we to distinguish those breaches of law which are crimes from those which are merely illegal without being criminal? Many attempts have been made to answer this question, and to propound a general definition of crime which shall distinguish wrongs which are criminal from those which are merely "civil,"

according to Professor Kenny,[2] and he proceeds to show that most of the attempts fail in some important point or other.

We seem to have been no more definite as regards procedure. "The so-called Anglo-Saxon Laws date from a well-recognised stage in the evolution of law," writes Mr Jenks.[3]

[1] Such threats are much feared, for the person who makes the threat is supposed to procure the services of an evil spirit. Even the Mohammedan Arabs and Berbers of North Africa are afraid of negro magic. See Tremearne, *The Ban of the Bori*, chap. xviii.

[2] *Outlines of Criminal Law*, p. 3.

[3] *A Short History of English Law*, pp. 1-14.

They reveal to us a patriarchal folk, living in isolated settlements, and leading lives regulated by immemorial custom. Whilst there are certain features common to all of them, showing us a society to some extent homogeneous, they differ in detail from one petty kingdom to another, almost from one village to another.

If it be asked whether, in this early period, there was anything which, without abuse of terms, may be called a Law of Contract, or a Law of Tort, it must be answered that if we insist on modern distinctions, there was not. But if we are content to look for primitive practices which may afterwards give rise to these modern ideas, we shall not look entirely in vain. For in the practices of giving *wed* (pledge), or the security for the performance of some act, or *borh* (bail), as surety for good conduct, we see undoubtedly the legal ancestors of the ancient contracts of pledge and guarantee. At first, it is probable, these practices were confined to the most urgent necessities of primitive law, viz. the submission to legal process and the maintenance of peace. But we can hardly suppose King Alfred to have placed in the forefront of his secular code the supreme importance of "holding one's wed"; unless the wed had covered a wider range of duty than the mere delivery of one's-self to justice. Of the very modern distinction which separates a breach of promise from a "wrong unconnected with contract," there is in this period no trace. Scarcely, as we have seen, are men beginning to draw the much earlier distinction between offences which merely involve the offender in a family feud, and those which also draw down on him the wrath of the King, with its outlawry and forfeiture. Therefore the famous generalisation of Sir Henry Maine[1] hardly fits the facts of the old English Law if indeed of any primitive system. The "penal law of ancient England" is not, "to use the English technical word," a "law of Torts." It is a law which, with rare exceptions, recognises merely the root idea of a wrong; it does not distinguish between crime, tort, and breach of contract. . . . Even at the present day, one and the selfsame act may be a crime, a breach of contract, and a tort.

The King's courts approached the field of tort through the field of crime,[2] and, apparently, there is an objection to saying that "in the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime, but on the Law of Tort."[3]

Examples of Nigerian Cases.—It may be interesting in this connection to note, without arguing upon one side or the other, some Nigerian cases tried by me during 1909.

The first was one of malicious wounding. It appeared that a youth, Gareba, had had a quarrel with a man of another town who was harbouring Gareba's runaway wife, and refused to give her up, so they had come to blows, and Gareba got the worst of it. Some days afterwards, he armed himself with a knife, and lying in wait near his opponent's town, caught a small boy, Umoru, related to the man, and wounded him severely. Then, feeling that justice had been done, he went home. The chiefs, fearing that the feud would be continued, appealed to the Resident. The result does not matter; the point is that there was no specific idea that Gareba was actually wrong in

[1] *Ancient Law* (ed. Pollock), p. 379.
[2] See Pollock and Maitland, *History of English Law*, ii. 530.
[3] *Ancient Law*, p. 381.

attacking Umoru, but that the revenge was rather severe and would cause a feud between the towns concerned.

Another interesting case, an "informal" one, was tried at Chori (Moroa District) soon afterwards. It seemed that years before, the chief, Dawiya, had sold a horse to a certain Hausa trader of Jemaan Dararo, and, as it had not been paid for at once, he had seized the man's daughter, Lahidi, who was staying at the time with her mother at Chori. The trader had afterwards tendered the payment, but Dawiya had refused to let the girl go, and, "owing to the medicines given her," Lahidi herself would not leave Chori. The system of pawning children or of handing them over to a creditor as security is very common in West Africa, and although it is now forbidden by our Slavery Laws, of course, Dawiya could not be punished for such an act, especially as it had been committed before our arrival, so the girl was ordered to be returned to her parents. Any further retention, however, was to be regarded as an offence against the Law, which was then explained to him.

A third case was amusing. In this Kura, chief of Kaura (a Katab town), claimed two horses from Dawiya's nephew, the boy—only about twelve years of age—being represented by his uncle as the father was dead. It appeared that, some thirty years before, Kura's father had given the boy's grandfather a goat to keep for him, and the latter had failed to return it on demand. The goat had, of course, brought forth many young ones, and a calculation of the value of the descendants gave an amount equal to the price of two horses for which Kura now sued—though perhaps the word "price" should not be used, for human-beings, horses, dogs, goats, fowls, and many commodities, such as salt and tobacco, were still currency there at the time. The boy admitted that his grandfather had received a goat, but maintained that he had paid for it, and that the goat had, therefore, become his own property. There also the decision had no purely legal interest, but it put an end to a dispute of some thirty years' standing, and satisfied both parties; for the boy was rather afraid that Kura (being a chief) would some day manage to get the whole of his goats from him, while Kura probably never expected to get anything at all under the strange European law.[1]

Now, in all of these cases, there is no distinction between criminal and civil offences or procedure. The goat which had been wrongfully kept was merely a debt, and Kura sued as a private individual. Dawiya on the contrary committed what we (now) consider a crime in order to right a civil wrong, but here again, the girl's father sued. In Gareba's case there is, at first sight, an apparent action by the chiefs, but it is only apparent, for neither chief could settle the feud, and they appealed to the European merely as a Political Officer (not as a Judge) in order to prevent further trouble. In all three cases, civil wrongs are mixed up with criminal acts, and no incongruity is noticed by the people concerned, for in every case the only remedy is to sue privately before the chief and elders, and, if they are

[1] A full account is given in *The Tailed Head-Hunters of Nigeria*.

not powerful enough to have their orders carried out, then the suitor takes his revenge privately as best he can. In every country the most primitive courts merely helped the successful suitor to enforce the decision.[1]

The above cases concern the more primitive tribes, of course. With the Hausas who used to rule large districts, the ideas became modified, but even with them there was no true distinction either in the offences themselves or the procedure, and it would seem that when the chief imposed a fine, it was simply in order to obtain the money for his own private benefit, and that there was no idea of State action. Still, this is an advance; and a still higher rung on the ladder was reached by the Filani whose judges were supposed to act in conformity with the Maliki code of Islam, an organised force of police being at hand to enforce the decisions.[2]

Introduction of Technical Legal Procedure.—It is a very great pity that the system of justice in West Africa is becoming so legal. The reason why British jurisdiction spread quickly in all directions is that the officials acted upon native ideas, and made no technical distinctions—even if they knew of them—between the different kinds of offences. They judged them simply by their gravity, and not according to their nomenclature in English law. As Sir Henry Maine points out[3]:

> There are two special dangers to which law, and society which is held together by law, appear to be liable in their infancy. One of them is that law may be too rapidly developed. . . . One of the rarest qualities of national character is the capacity for applying and working out the law, as such, at the cost of constant miscarriages of abstract justice, without at the same time losing the hope or the wish that law may be conformed to a higher ideal. . . . The other liability to which the infancy of society is exposed has prevented or arrested the progress of far the greater part of mankind. The rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form.

Nothing could be more appropriate to the conditions in West Africa. Under the Judicial Assessors, the native custom was not suddenly overthrown, it was purified and developed upon broad and unbiassed lines. The danger at present is the subordination of all custom to English Law administered in courts careful to preserve a technical procedure, for it is only natural that native barristers called in England should wish to take advantage of their training upon their return to their own country, and so secure local recognition, for it is not only in India that the graduate commands a higher "husband-price" in the marriage-market. It is just as natural that the

[1] In story No. 62, *Hausa Superstitions and Customs*, the chief hands over a wrong-doer to his former victim for punishment.

[2] They took the court fees, however, and so were always liable to be tempted. Under the new organisation of the three Protectorates into one, the Alkalis are paid a regular salary.

[3] *Op. cit.*, chap. IV.

European judge appointed because of his qualifications in English Law should prefer to trust to those rather than to a hazy acquaintance with native custom.[1] We are travelling much too fast. "It is the glory of English Law that its roots are sunk deep into the soil of national history; that it is the slow product of the age-long growth of the national life."[2] We must continue the development, of course, but let it be upon lines with a more gentle gradient, and let us purify the African law rather than supersede it by our own.

The native cannot understand our proud boast that a person accused of an offence even in the highest civil Court must be presumed to be innocent until he has been proved to be guilty. No doubt this maxim has saved many innocent men in England, but many more criminals must have escaped through its operation, and it is not altogether applicable in primitive communities. Nor is it appropriate in war time, for the civil Courts have failed lamentably in some of the espionage cases. The principle is not universal even in England, however, for in the lower military courts (*e.g.* that of the Commanding Officer) the judge is not expected to suppose that a prisoner has been brought before him unjustly.

Criminal Evidence.—Another point is that some Courts may interrogate an accused person in certain cases even though he elects not to give evidence, and, although it cannot punish him for silence or falsehood, the Court can draw such inference as may seem just, not only as regards the offence for which the accused is then tried, but for any other. Mr. Redwar (at one time a judge in the Gold Coast Colony) considers this to be eminently unfair, because the prosecution can suggest—

> questions to be put by the Court which would never be allowed by any English Judge, who, apart from his own accumulated experience, is under the searching criticism of the press, the profession, and an enlightened public. . . . It should be remembered that very frequently Government officers, with no legal training, and no acquaintance with the English law of evidence, are appointed to act as District Commissioners, and, being invested with this power, may, quite unwittingly and in perfect good faith, be led into grave errors and indiscretions of this description.[3]

With the greatest possible respect I venture to differ. Even if the practice is not common on the Gold Coast, it certainly was so in Northern Nigeria, and very often the accused was enabled to explain facts which looked

[1] It is only fair to say, however, that Mr. Mayne (*A Treatise on Hindu Law nd Custom*, p. 43) thinks that in India, English judges have caused stagnation, and have not introduced English Law. "Their influence was exerted in the opposite direction, and . . . it rather showed itself in the pedantic maintenance of doctrines whose letter was still existing, but whose spirit was dying away." This, however, still supports the protest against the West African system becoming too legal and inelastic. The sacredness of custom is well demonstrated in the code of Manu, where we are told that "immemorial usage is transcendant law" (*ibid.* p. 47).

[2] Jenks, *op. cit.*, p. 1.

[3] *Comments on Some Ordinances of the Gold Coast Colony*, p. 121.

black against him. The English laws of evidence are quite inapplicable to most West African cases. The natives ask justice from us, not technical refinements in procedure. It was the splendid type of official in the early days, who, although ignorant of the laws of evidence then prevailing, by managing to administer justice, created the desire in the natives to come under our protection [1]; it is only since the more complicated procedure was introduced that so much has been heard of the unsuitability of our laws.

Practice of Interrogation.—The practice of interrogation is entirely in accord with native ideas, and, after all, surely it is only an extension of the provisions of our own Criminal Evidence Act of 1898, for, by it, the Court is not prevented from commenting upon a prisoner's refusal to give evidence, and experience seems to show that "juries, without the help of any comment, readily draw for themselves a hostile inference from the prisoner's refusal." [2] In Northern Nigeria at present, by the provisions of the Criminal Code (s. 8)—"every person charged with an offence is a competent witness for the defence at every stage of the proceedings, but he shall not be called except upon his own application, and his failure to give evidence shall not be made the subject of any comment by the prosecution." He may, of course, make a statement without being sworn. The power of interrogation by West African Courts, therefore, is not unreasonable, nor is it strange that—

> In any cause or matter, and at any stage thereof, the court, either of its own motion or on the application of any party, may summon any person to attend to give evidence, or to produce any document in his possession, and may examine such person as a witness or expert, and require him to produce any document in his possession or power, subject to just exceptions.[3]

Objections to Legal Profession.—Many people who know West Africa think that the admission of advocates has not advanced the cause of justice in the countries concerned, although it has no doubt tended to bring out many interesting points of law.[4] That Europeans are not alone in this opinion is proved by the fact that in the agreement between the Government of Lagos and the Bale (Chief) of Ibadan (August 8, 1904), regulating the jurisdiction of the Government over Ibadan, appears the clause—

> The Bale and Council of the Ibadan Province for and on behalf of themselves, their

[1] Captain Maclean, "with a force of no more than one hundred men at command, and with a Government subsidy of only £4,000 a year, contrived to extend and maintain the influence of his Government over the whole tract of country now known as the Gold Coast."—*The Colonial Office List*, "The Gold Coast."

[2] Kenny, *op. cit.*, p. 402. See also pp. 496-8.

[3] See the Supreme Court Proclamation, Northern Nigeria, s. 41.

[4] It is not always necessary that a person should have qualified as a barrister or solicitor before he can be allowed to practise. Thus in Northern Nigeria the Chief Justice may admit temporarily "so many other fit and proper persons to appear and act in the capacity of barristers and solicitors as may appear necessary." Supreme Court Proclamation, Schedule I., Order VIII. para. 4. Every barrister can sue for his taxed costs. *Ibid.* para. 7.

heirs and successors and the natives of the Ibadan Province, hereby declare that it is their strong desire that Barristers and Solicitors shall not be allowed to practise in the Courts exercising the civil jurisdiction hereinbefore acknowledged.[1]

In Ashanti, also, "in no cause or matter, civil or criminal shall the employment of a barrister or a solicitor be allowed,"[2] and I am assured by an official who has been for many years in that country that this provision was made at the spontaneous request of the chiefs, and that no pressure was put upon them by any European.[3]

In a civilised country, where governors and governed are of the same race, it is no doubt unwise to confuse the Legislative, the Administrative, and the Judicial functions, but in West Africa the same official sometimes has to make, to execute, and to interpret a law, and, since he is outside the local influences, not much harm is done. To the natives there seems to be no incongruity in this, for their chiefs had and still have both political and judicial powers,[4] and, before our arrival, it was more common for a man to be executed for the non-payment of a debt to the ruler than for the murder of a fellow-subject.

[1] *The Laws of Southern Nigeria*, p. 263.

[2] *The Ordinances of Ashanti* (1902-10), p. 3.

[3] I was in Ashanti in 1900–1, but this question had not then arisen.

[4] Thus by the Southern Nigerian Ordinance No. 7 of 1906, Native Councils were empowered to make rules (*inter alia*) "embodying any Native Law in the district with or without additions and modifications . . . regulating and promoting trade . . . [and] generally providing for the peace, good order, and welfare of the natives therein."

AN IMPERIAL LEGISLATIVE REFERENCE BUREAU

[*Contributed by* C. E. A. Bedwell, Esq., *Keeper of the Middle Temple Library.*]

One of the primary objects of the Society of Comparative Legislation from its foundation has been to create a centre of information for the lawyer, the politician and the sociologist, where they may obtain particulars concerning the laws of the various parts of the British Empire and other countries, together with some account of their operation. Attempts have been made by various means to accomplish that object, but it is recognised that much remains to be done before the Society has made full provision for the growing needs of students of various types. The present purpose is to suggest a development which has been found helpful elsewhere and is capable of modification and extension to meet the requirements of members of the Society.

Legislative Reference Bureaus.—Within a short period of time there have been established throughout the United States a number of institutions known as "Legislative Reference Bureaus." Having formed the subject of numerous articles in periodical literature, they have now reached the stage of providing material for the greater part of a book dealing with "Law Legislative and Municipal Reference Libraries,"[1] written by Mr. J. B. Kaiser who was formerly in charge of the Legislative Reference Work in the Texas State Library, from which much of the information contained in these notes has been drawn. By him the object of legislative reference work is defined to be—

> to provide members of legislatures, state officers, and those of the public at large interested in law-making with the data of existing law and comparative experience, to the end that legislation may henceforth represent the actual needs of the people as made known through careful surveys of social and economic conditions, well-grounded theories, and through the adaptation to these conditions of existing law to whatever extent comparative experience shows it to be properly adaptable.

In order, however, to appreciate the aims of these bureaus, it is necessary to note some of the circumstances which have been the occasion of their origin.

Intelligent Legislation.—The primary cause of the foundation of legislative reference bureaus has been widespread criticism of the output of the Federal and State legislatures both as to form and content.[2] Three defects are noticeable in the progress of law-making in the United States. First,

[1] Published by the Boston Book Co. $4.

[2] See, for example, "Review of Legislation, 1913," p. 155.

there is an absence of individual responsibility upon members of the legislature. They may introduce any number of bills without having any real concern as to their purpose or the methods of carrying it into effect. Secondly, there is a lack of expert advice, so that instead of representing the result of careful study by competent observers, legislation too often reflects vague and unnatural beliefs and popular prejudices. The third defect—errors in legal form—may be ascribed to a similar cause, since the absence of expert draftsmen results in a failure to observe constitutional limitations and the force of existing law as well as known rules of construction and terminology. There has been, therefore, a demand for "intelligent legislation."

A desire for the improvement of legislation has been prompted by constructive as well as destructive criticism. For many years thousands of immigrants have been pouring into the States from all the countries of Europe. Much has been done to Americanise them and make them amenable to, and so far as possible in harmony with their new surroundings. Nevertheless it has been recognised that in the systems of law under which they were born, there may have been many points suitable for adoption in or adaptation to the laws of the United States. The Comparative Law Bureau of the American Bar Association and other bodies and individuals have done much to further a study of the laws of European countries in order to promote this purpose, and the legislative reference bureaus have been expected to make their contribution.

The Origin of the Bureaus.—Primarily the legislative reference bureaus are a development of library work as a contribution towards the solution of the "problem of intelligent legislation." One of the earliest examples of the kind of work which they undertake was the index to the legislation of all the States prepared in the New York State Library, under the direction of Mr. Melvil Dewey. If a State legislature proposes to legislate upon any subject, the first and obvious question is to ask whether there exists already similar legislation in any other State? Next, are the conditions the same, and, if so, has it accomplished its purpose? Such questions must and do arise time after time in the Dominions and Colonies of the British Empire. Parliamentary inquiries with a view to legislation at Westminster, Ottawa, Melbourne or Capetown are frequently required to pay special attention to this aspect of their study. The first step in providing such information is an index for the legislation of the British Empire similar to that of the American States compiled by the New York State Library. The consolidation [1] from this Journal of the reviews of legislation published five years ago, is a beginning in that direction by serving as an index to the principal enactments, and more comprehensive material is available for reference in manuscript. Other work might be undertaken of a similar character. The growing demand

[1] *Legislation of the Empire,* being a survey of the legislative enactments of the British Dominions, from 1898 to 1907, 4 vols., London, 1909.

for information and the inquiries which reach individual officials of the Society from time to time suggest that there is a need which has not been met elsewhere and might possibly be provided for by the Society. The present object is to elicit expressions of opinion as to what might be done, or still better to obtain concrete inquiries which would show exactly the nature of the requirements.[1]

Equipment of the Bureau.—Starting in nearly every instance as a branch of library work, the Legislative Reference Bureau has developed in some places into a separate organisation. In course of time, however, much of the material at its disposal was found merely to be a duplicate of matter already available in the State Library, with the result that there was a certain amount of overlapping and waste. There has been, therefore, a return to the original purpose of maintaining the legislative reference work as a part of the library work. But it must be remembered that the State libraries possess comprehensive sets of the legislation of the other States, whereas it is difficult to find complete sets in London of the legislation of the various parts of the British Empire. Neither the Colonial Office nor the Royal Colonial Institute take cognisance of Indian legislation. Each of the four Inns of Court has a collection more or less complete, and in recent years particular attention has been paid to this section of the Middle Temple Library. The absence of co-ordination and any systematic co-operation suggests that the Society, being sympathetically supported by all of them, might be able to form a connecting link to meet any requirements which found expression in a definite form. Moreover it is interesting to note in this connection Mr. Kaiser's conclusion as to the character of the library most suited for legislative reference purposes.

"The complexity and multiplicity of subjects," he writes, "which the legislation of to-day is made to cover would make it appear that at least theoretically a spacious library, unlimited in scope, is the best laboratory for this work. Actually, however, it is the carefully selected library offering the latest and the best in convenient and compact form that renders service most effectively."

Although the Society's library is limited in size, it is possible for it to be developed so as to fulfil this purpose. In the working of the Legislative Reference Bureau one of the most useful additions to the library is found to be the records of information collected in response to the requirements of users, so that the activities of the bureau would by geometrical progression increase its utility and the Society's correspondents no doubt would co-operate by sending material which is so valuable when indexed and made available, but otherwise is swallowed up in the vortex of literary matter. Mr. Kaiser assumes that while using a special library of limited scope, the work of the Legislative Reference Bureau "should be carried on within easy reach of the full resources of large collections in the fields of law, political and social

[1] Correspondence may be addressed to the Chairman of the Executive Committee, Sir Courtenay Ilbert, or to the Editors, c/o the Publisher.

science, history and economics." That requisite would be readily supplied by the large libraries available in London, to which the representatives of the Society's bureau would have no difficulty in obtaining access.

Development of the Work of the Bureaus.—A natural development of the work of some of the Legislative Reference Bureaus has been the creation of drafting departments,[1] whose object is to remedy the defects in form which have been criticised in legislation. The need has been felt more in the United States because there has been nothing like the Parliamentary Counsel's Office either to aid the Federal Legislature or the State legislatures, and the private member contributes far more copiously to the legislation than he does in this country. Much of the legislation of the British Dominion legislatures is admirable in form, and though the enactments of the Crown Colonies are sometimes capable of improvement, it would seem that there is no immediate demand for the development in this direction of the work of the Society of Comparative Legislation. However this natural correlative to the work of the legislative reference bureau deserves mention since it suggests a matter upon which some readers may desire to express an opinion for consideration in connection with any action which might be undertaken to carry out the suggestion put forward in these notes.

The Aim of an Imperial Bureau.—Although a legislative reference bureau is necessarily concerned primarily with legislation, there is no reason why its activities should be for the benefit only of legislators. So many people, especially in the growing body of social reformers, are interested in legislation that a bureau of this character should be useful to laymen as well as to lawyers and law-makers. Moreover it might hope to become a means of intercommunication between people in different parts of the British Empire and so make its contribution to that closer union which is being developed by such means as well as or, perhaps, even more than by more formal methods. In putting forward this suggestion there is no desire whatever to create some elaborate piece of machinery upon which a great deal of time and energy might easily be expended without any appreciable result. But rather the purpose has been to note the methods of working of an organisation which has been found useful elsewhere, to suggest that something of the same kind may be helpful in connection with the work of the Society of Comparative Legislation, and to express a readiness to receive inquiries, comments and criticisms so that, if there is work to be done, an attempt may be made to undertake and develop it in accordance with the requirements of members of the Society and readers of this Journal upon lines which shall be of practical value in furthering the objects undertaken upon its foundation twenty years ago.

[1] For an account of the system used in the Bill Drafting Department of the Legislative Reference Library of Wisconsin see Kaiser, "Law Legislative and Municipal Reference Libraries," pp. 175-182, and see also "Scientific Assistance in Law-making," by Horace E. Flack, Director of the Department of Legislative Reference, Baltimore, in Supplement to *American Political Science Review*, Feb. 1914, pp. 215-221.

COMMON LAW NATURALISATION AND EXPATRIATION.

[*Contributed by* F. B. Edwards, Esq., LL.B., B.A.]

(A) Naturalisation.

It is not proposed to consider denization here, since it is not strictly naturalisation. The only Common Law Naturalisation (apart from denization) results from the addition of new territory to the King's dominions.

Naturalisation as the Result of an Addition of Territory to the British Dominions.—In the case of territory that is acquired by reconquest from an enemy, *Gumbes* v. *Commissioners on French Claims*[1] declares that such territory "reverts to the same state that it was in before its conquest." The second acquisition is, in fact, considered rather as a resumption than a conquest. It is in effect a denial of the power in the enemy to maintain exclusive possession —the *ius ad rem*. Such country is to be deemed always to have remained British, so that all children born therein during the period of its conquest by the enemy are to be deemed to be and always to have been natural-born British subjects, save the children born to the enemy,[2] and those who were British subjects before the date of conquest are to be deemed to have retained that quality during the period of foreign control.[3]

As to other territory, it seems clear that whenever an addition is made to the British Empire, that addition in the absence of special provision to the contrary,[4] operates to confer British nationality upon the inhabitants ; but the rights acquired over that territory must be rights of full sovereignty—that is to say, such as amount to absolute ownership.[5]

Methods of Acquisition.—This acquisition of new domains may be brought about by unilateral or bilateral acts : the former class comprises occupation of new countries[6] and conquest of territories from another State : the only bilateral way is cession effected by treaty. There is convincing authority for the

[1] 2 Knapp 369. [2] *Calvin's Case*, 7 Co. Rep. 1.

[3] The reconquest must occur either in the same war or at least within a reasonable time, probably the former, since a cessation of the state of war implies an abandonment.

[4] *I.e.* by way of treaty: cf. cession of Minorca to Spain in 1782: *Jephson* v. *Riera*, 1835, 3 Knapp 130: see *The Mayor of Lyons* v. *The East India Company*, (1836) 1 Moo. P.C. 175 at p. 287 : cf. Art. 7 of Convention of April 8, 1904, between Great Britain and France (British Treaties, 1905, No. 5) as to West Africa.

[5] This excludes protectorates and spheres of influence. In the case of the lease in perpetuity under which the British Government holds certain territories from the Sultan of Zanzibar, it seems absurd to hold that the technical objection that the transfer is in the form of a lease should prevail in this connection.

[6] See this Journal, N.S. vol. xiv. p. 322.

statement that both conquest and cession, in the absence of provision to the contrary,[1] result in the affixing of the British character to the inhabitants of the lands conquered or ceded, and though there seems to be no judicial authority for extending this result to the occupation of new countries, such a course seems to be consistent with general principle and in accordance with practice.[2]

It was laid down by Lord Mansfield in *Campbell* v. *Hall*[3] of a country conquered by the British arms that "the conquered inhabitants, once received into the conqueror's protection become subjects; and are universally to be considered in that light, not as enemies or aliens." This principle was repeated in *Donegani* v. *Donegani*[4] in the following form: "When the King of England became King of Canada, the natives of Canada became his subjects," and confirmed by the Privy Council in the following year in the case of *The Mayor of Lyons* v. *The East India Company*.

In *Fabrigas* v. *Mostyn*[5] the result of an acquisition of territory upon the nationality of its inhabitants was expressed in very positive language. It was objected on behalf of the defendant, a native of Minorca, that the plaintiff was not entitled to succeed because it was not stated on the record that he was born since the Peace of Utrecht, by which Minorca was ceded to Great Britain: Lord Mansfield ruled the objection untenable, for from the moment of the cession all the inhabitants of the island were under the allegiance and were entitled to the protection of the British Crown.[6]

The same general principle was the basis of the decision in *Jephson* v. *Riera*, and was assumed to be sound law by the Court which gave judgment in *Isaacson* v. *Durant*[7]: the assumption in the last cited case also covered the case of the inhabitants of a conquered country. It is of course presumed that the treaty has been duly made by the proper authority of the ceding State.

Change of Rule.—In an article published in this Journal[8] it was shown when territory passes out of one rule into another. It will be observed that the cases speak of the "inhabitants" or "natives" of the newly acquired territory as becoming subjects of its new sovereign. The effect of a change of sovereignty in the absence of special provisions to the contrary is to convert the inhabitants or natives of the conquered territory into subjects of the new sovereign; in the event of the new sovereign being

[1] *The Mayor of Lyons* v. *The East India Company*, (1836) 1 Moo. P.C. 175 at pp. 286, 287.

[2] Cf. Anglo-French Agreement on New Hebrides (British Treaties, 1907, vol. i. No. 2).

[3] (1774) 20 St. Tr. 323. [4] (1835) 3 Knapp 63 at p. 85. [5] Cowp. 161.

[6] Cf. *Doe, d. Thomas* v. *Acklam*, 2 B. & C. 779, at p. 796, where Abbott C.J. declared that "a relinquishment of the government of a territory is a relinquishment of authority over the inhabitants of that territory."

[7] (1886) 17 Q.B.D. 54. (The assumption appears in that part of the judgment that refutes the suggestion that Hanoverians had an option of remaining British subjects.)

[8] See Journal, vol. xiv. pp. 321-3.

the Crown of the United Kingdom, these inhabitants or natives become British subjects. There are two important points in this connection; one is to show whom the term "inhabitant" comprises, the other is to indicate what particular British status is conferred upon the new subject,—in other words, is he to be considered as a natural-born, naturalised, or denizened subject?

Effect of Conquest upon Inhabitants.—It is inconceivable that when one State acquires the whole of the territory of another so that the latter becomes defunct, all persons within the acquired country should thereupon become subjects of its new sovereign[1]; that is a state of affairs which could not exist side by side with the peace of the world. It seems therefore that occupation, cession, or conquest cannot operate to confer a new nationality upon those inhabitants of the conquered territory who were not subjects of the late sovereign: only such persons as were subjects of that sovereign can be nationally affected. And similarly if the newly acquired country be a part only of the domains of its late masters, the effect of the change of sovereignty upon nationality is confined to such persons as were subjects of the previous sovereign. The term "inhabitants" therefore does not include persons within the territory in question who were aliens to its former sovereign.

It was asserted by the late Mr. Hall that the effect of any conquest is to invest the conquering State with sovereignty over all subjects of a wholly conquered State, and over such subjects of a partially conquered State as are identified with the conquered territory at the time when the conquest is definitively effected, so that they become subjects of the new sovereign.[2] So far, however, as English law is concerned there seems to be no direct authority for the inclusion of subjects who are not inhabitants of the conquered territory[3]; but it is quite clear that the inhabitants become British subjects, whether the acquisition be of the whole or a part only of the domains of a foreign State. Some difficulty exists in putting the correct interpretation on the term "inhabitants." It is submitted that it covers such and only such of the subjects of the late sovereign as were clearly and definitely attached to the lands in question; it would therefore include such of them as were born therein and were still resident there, but probably not such of the natives as were not at the time of the change of title permanently settled there; it would also seem to cover all subjects other than natives who were at that time established more or less permanently there, but not such of them as merely happened to be present on a visit.[4] Professor Westlake, writing from the point of view of an international rather than of a municipal lawyer,

[1] Cf. Cogordan, *La Nationalité* (2me édition), p. 322.

[2] *International Law* (6th edition), p. 565.

[3] See the cases already cited (*supra*); there is, however, no authority denying that such subjects, on a complete conquest of their State, pass into the conquering State as its subjects.

[4] Cf. Hall, *International Law* (6th edition), p. 565; Westlake, *Public International Law* (2nd edition, Pt. I.—Peace), p. 70; and an article by the latter in the *Law Quarterly Review* (1901), vol. xvii. pp. 399-400.

seems to consider that the inhabitants in question have a right of option,[1] but so far as English law is concerned the existence of any option is expressly denied in the judgment in *Isaacson* v. *Durant*.[2]

In spite of the language used in *The Mayor of Lyons* v. *The East India Company*,[3] it does not seem probable that the new subjects become denizens merely ; the declaration later on in that judgment that "the Court below . . . distinctly admit that conquest operates what they term a virtual naturalization," seems to be opposed to such a limitation. We conceive that what really happens is that they are received into the body of subjects of the new State, because the new sovereign has by a "universal succession" become entitled to all the rights of the old sovereign in respect of the conquered territory[4]; and that they rank in their new State as natural-born[5] rather than as naturalised subjects, seems to have been the view of the British Government in 1907, for otherwise the appointment of General Botha to the Privy Council in that year cannot be justified.[6]

Both Rivier[7] and Cogordan[8] were of opinion that the results which we have submitted as the legal consequence—according to English law—of changes of territorial sovereignty are also quite consistent with the general attitude in foreign countries on the point.[9] It seems then unlikely that conflicts should arise, but English law makes no provision for such a contingency, and will hold firmly that the inhabitants of the newly acquired territory become British subjects.

(B) Expatriation.

Common Law expatriation results from the loss of British territory, for just as addition to the Crown's dominions by conquest or cession treaty, in the absence of express provisions to the contrary, involves the naturalisation of all the inhabitants of the acquired territory, so also when the Crown's sovereignty over any portion of those dominions passes, as the result of conquest or cession, to some other sovereign power, all the inhabitants of the conquered or ceded territory who at that time are British subjects, unless it be specially provided to the contrary, forthwith lose their national character and become aliens.

[1] See his works quoted immediately above.
[2] (1886) 17 Q.B.D. 54 at p. 60.
[3] 1 Moo. P. C. 175 at p. 286.
[4] Cf. Westlake, *Public International Law* (2nd edition, Pt. I.—Peace) at p. 70.
[5] Or at any rate such of them as were natural-born subjects of their former State.
[6] Cf. Keith, *Responsible Government in the Dominions* (1912), vol. iii. p. 1155 (note).
[7] *Principes du Droit des Gens* (1896), Bk. II. pp. 438-9.
[8] *La Nationalité* (2me édition), pp. 317, 320, 327.
[9] Cf. article in *Journal du Droit International Prive* (1907), 306-13, by M. Emilio M. Pagliano (Avocat à Rome), where it is stated that Italian nationality is acquired, among other ways, by (1) Reunion (conquest, treaty of peace, or voluntary annexation), whereupon become Italian citizens : (*a*) all the "naturels" of the territory being Italians ; (*b*) all the inhabitants of the territory not being Italians, but not the foreigners there.

Effect of Rebellion.—A body of rebels cannot effect a conquest of any lands of the Crown, so that even if a whole province has revolted and the actual power of the King there has been destroyed, that province remains none the less a part of the Crown's dominions, and the rebels are his subjects. In order that a complete ousting of the authority of the sovereign should produce a change of sovereignty it is essential that the actual masters of the country should be alien enemies and not rebel subjects. And until the Crown sees fit to recognise by some formal act the independence of the revolting colony, the rebels there are British subjects and the province remains a part of the British Empire.

The general rule put forward by Lord Stowell in *The Fama*,[1] requiring both a *ius in rem* and a *ius in re* for the completion of a national title to a country, applies no less to loss as to acquisition of territory.

Loss of Nationality by Conquest.—There is no direct English authority for the statement that when British territory is conquered by a foreign Power the inhabitants of that territory cease to be British subjects. The analogy of conquest of foreign lands by the British arms is, however, too strong to allow that statement to be challenged; and if we accept the theory of the universal succession of the new sovereign to the rights and liabilities of the old sovereign, we must inevitably accept the doctrine that the inhabitants of British territory conquered by an alien Power thereupon lose their British nationality, unless indeed some special exception has been made by the conqueror. Lord Brougham's declaration in *The Mayor of Lyons* v. *The East India Company*,[2] that "all the authorities lay it down that upon a conquest the inhabitants *ante nati*, as well as *post nati*, of the conquered country become denizens of the conquered country,"[3] although *obiter* so far as conquest of British territory is concerned, almost certainly expresses the general condition of the law. That judgment proceeds: "and to maintain that the conquered people become aliens to their new sovereign, upon his accession to the dominion over them, appears extremely absurd." We take it, therefore, that the result of such a conquest is to denationalise such of the inhabitants as happen to be British subjects.[4] This conclusion is supported by the difficulty which one has in conceiving so great an inconsistency in the law as that there should be two such widely divergent principles for the settlement of two so closely analogous positions.

Effect of Cession of Territory.—The result of a cession of British territory to a foreign State is the basis of the decision in the case of *Jephson* v. *Riera*.[5]

[1] 5 Rob. 115.

[2] (1836) 1 Moo. P.C. 175 at p. 287.

[3] And therefore subjects of the new sovereign.

[4] Cf. Forsyth, *Cases and Opinions on Constitutional Law*, p. 334; Foote, *Private International Jurisprudence* (4th Edition) p. 8; *Doe, d. Thomas* v. *Acklam* (2 B. & C. 779 at p. 796, per Abbott C.J.): "a relinquishment of the government of a territory is a relinquishment of authority over the inhabitants of that territory."

[5] (1835) 3 Knapp 130.

The facts of the case were as follows: A. was a natural-born subject of the Crown born in Minorca whilst it was a British possession; subsequently the island ceded to Spain, and a period was fixed within which British subjects were allowed to remove themselves; A. at the time was still a British subject and settled there; within the time allowed by the cession treaty A. left the island to seek employment in England; it appears that during the following year he returned to Minorca. On a question whether A. was a British subject or an alien, it was held that as he at the time of leaving the island had abandoned all intention of returning to reside there, it must be taken that his absence was not merely a temporary one, and accordingly that he retained his British status. If he had gone to England on a temporary visit, he would not have been deemed to have complied with the treaty clause for the "removal" of British subjects, and the ordinary law of cession would have applied and converted him into an alien. This case expresses the influence of cession to a nicety; in the absence of express provision British subjects more or less permanently settled in and identifiable with the ceded country, *ipso facto* lose their former nationality; if the treaty specially provides a way of rendering this normal result nugatory, such of the British inhabitants as comply with those special provisions retain their nationality; the rest become subjects of the new sovereign.

The recognition of the independence of the United States of America by Great Britain in 1783 has furnished a number of cases defining the effect of such a recognition upon the national status of persons hitherto enjoying the quality of British subject.

Effect of Constitution of New State.—It is just as essential for the establishment of a new state as for the addition of territory to an already existing one, that a good title to its territory, involving both a *ius in rem* and a *ius in re*, should be established.[1] When that new State has grown out of a British possession—whether as a result of rebellion or peacefully—English law regards its birth as dating from the moment when the Crown has in due form renounced its sovereignty over that possession. The intention on the part of the hitherto dependent community, to maintain itself as a sovereign State, together with the duly published recognition of its independence on the part of the mother State, constitutes the necessary *ius ad rem*; the publication is required in order that those most deeply interested in the event, namely British subjects resident there, may be informed of the change. The *ius in rem* is the actual possession and ability to maintain it.

Release from Allegiance.—The material part of a recognition of independence is a declaration on the part of the sovereign that the hitherto subordinate State shall be free, sovereign, and independent, and this amounts to a declaration that "the people composing the State shall no longer be considered as subjects of the sovereign by whom such a declaration is made";[2] it frees

[1] Cf. *The Fama*, 5 Rob. 115.

[2] *Doe, d. Thomas* v. *Acklam*, 2 B. & C. 779 at p. 796 (Abbott C.J.).

from their allegiance to the Crown such British subjects as are at the moment of, or immediately upon, the declaration, members of the new State. It can only affect British subjects at that time actually settled within the territorial limits of the new community; "the treaty of 1783 empowered British-born subjects then settled in America to become American citizens. It did not empower British-born subjects who never had previously been in America to emigrate there at any time thereafter, and throw off their natural allegiance to the Crown of these realms."[1] It seems quite clear on these authorities that an essential qualification for release from allegiance under this title is a more or less permanent residence within the jurisdiction of the new State; only those British subjects who are actual inhabitants within that jurisdiction can possibly be thereby released from their allegiance.

But a further qualification is imposed; for it is required of those claiming to be members of the new State that at the time of the recognition of independence they were adhering to the new State,[2] or rather that immediately upon such recognition they became citizens thereof.[3] Whether any particular person at the time of recognition actually does become a citizen of the new State seems to be dependent entirely upon the circumstances and to be a question of fact; and it seems that evidence of his attitude towards the parent State or the embryo State both before and after the date of independence may be adduced. The point to be proved, however, is not that he was in enmity with the Crown or had expressly or impliedly become an adherent of the infant State either before or after that date; it is necessary to prove that immediately upon the recognition of independence he was a member of the new community. The evidence upon which the decision in *Doe, d. Auchmuty* v. *Mulcaster* was based, is that the father of the lessors of the plaintiff was an American loyalist who embarked with the British troops when they evacuated New York pursuant to the treaty of peace in 1783; that he resided for about two years in England before returning in 1785 to serve on a British Board of Commissioners; that after the termination of his employment by the British Government, he settled in the United States, married, and begat the lessor of the plaintiff; and that he continued to reside there until the time of his death. Although he was born in America, and in later life settled permanently within the United States, the fact that before the peace he was a loyalist, taken with his conduct after the conclusion of the treaty, was considered sufficient ground for the conclusion that he was not at the time of the treaty "adhering to" and therefore a citizen of the United States. That another British inhabitant had continued to reside—that is to say, did not at once or within a reasonable time cease to reside—within the United States

[1] *Fitch* v. *Weber* 6 Hare 51 at p. 59.

[2] *Doe, d. Auchmuty* v. *Mulcaster*, 5 B. & C. 771 at p. 775; Abbott C. J.: "It is not found that . . . the father of the . . . plaintiff, was at the time of the treaty in 1783 adhering to the United States. The facts stated prove the reverse and bring the case directly within the Stat. 4 Geo. 2 c. 21."

[3] *Doe, d. Thomas* v. *Acklam*, 2 B. & C. 779 at p. 795 (Abbott C.J.).

had the year before been held sufficient evidence that he had manifestly become a citizen of the United States at the date of the treaty.[1]

It was suggested in *Isaacson* v. *Durant*,[2] mainly on the authority of *In re Bruce*,[3] that on a recognition of independence[4] all the subject-inhabitants are given an option of retaining their British nationality or becoming nationals of the new State. This suggestion was not adopted by the Court, and the existence of any option was not allowed. So far as the decision in *Isaacson* v. *Durant*[2] may affect the results of a recognition of independence, it is clearly *obiter*: it is submitted that to that extent it is unsound. The existence of some kind of option is, in the very nature of things, essential here; for the new State does not come into existence, in the view of English law, until the recognition of independence is announced; and consequently it is impossible to tell if a given person adheres to it unless the circumstances or his own declaration show a choice in that direction. It does not appear from the cases[5] that a mere declaration is sufficient indication of having become a citizen or subject of the newly-born State; the tendency is to require the evidence more of deeds than of words. The option must be exercised immediately upon the recognition of independence, and is evidenced apparently by sustained conduct only. The inhabitant may become a subject by continuing to reside within the newly created State; he may retain his British nationality by promptly removing himself therefrom. Baron Bayley's judgment in *In re Bruce* declares that "upon the treaty between this country and the United States, he had the option of continuing a British subject if he should elect Great Britain as his country or of ceasing to be a British subject and becoming to all intents and purposes an American."[6] This language does not make it clear that the option is to be exercised immediately upon the recognition of independence. The same distinguished judge presented the position in a much clearer light in *Doe, d. Auchmuty* v. *Mulcaster*, where he says: "There is a very plain distinction between this case and that of *Doe, d. Thomas* v. *Acklam*. In that case it appeared that the parent, through whom the claim was made, put off his allegiance *at the time of* the treaty which enabled him to do so. Here Robert Nicholls Auchmuty took no such step *at that time*, and the law did not enable him to do so at any future time."[7]

These cases all fit in with the theory which we have propounded, that whether a particular British inhabitant is at the moment of the recognition of independence a citizen or subject of the released colony is a question of fact.

[1] Cf. *Doe, d. Thomas* v. *Acklam*, 2 B. & C. 779 at p. 795: "She was born after the independence of the colonies was recognised by the Crown of Great Britain; after the colonies had become United States, and their inhabitants generally citizens of those States; and her father, by his continued residence in those States, manifestly became a citizen of them" (Abbott C.J.).

[2] (1886) 17 Q.B.D. 54.

[3] 2 Cr. & Jer. 436 at p. 450.

[4] Also on conquest, cession, and separation of Crowns.

[5] *In re Bruce*; *Doe, d. Auchmuty* v. *Mulcaster*; *Doe, d. Thomas* v. *Acklam*.

[6] 2 Cr. & Jer. 436 at p. 450.

[7] 5 B. & C. 771 at p. 775.

A BIBLIOGRAPHICAL INTRODUCTION TO THE STUDY OF CHINESE LAW.

[*Contributed by the* Hon. Charles Sumner Lobingier, *Judge of the United States Court for China.*]

A few years ago a treatise under the above title would probably have encountered indifference, if not derision. Indeed, any one who might suppose that a system of Chinese law existed would have been quite content to leave it to the antiquarian or the anthropologist. "Practical" lawyers would have been sure that they, at least, could have no concern with such a theme.

But considerations, "practical" as well as scientific, have wrought a change. The opening of Chinese markets to the world, and the participation of outsiders in her vast commerce, have rendered necessary some knowledge of the rules and customs upon which that commerce is conducted, and the almost limitless possibilities of its expansion give the subject an increasing importance, which the lawyer, no more than the merchant, can afford to disregard.

On the scientific side, the growing interest in comparative law, as evidenced by the formation of learned societies devoted to its study, and the publication of books and periodicals designed to promote interest therein, has finally, though gradually, brought to legal students a sense of realisation of the loss incurred by ignoring the lessons afforded by any legal system, past or present, which has passed through the various stages of adolescence, development, and maturity. This has long been recognised with regard to Roman law; it is at least beginning to be recognised with reference to the jurisprudence of a nation which was old when Rome was young, which has outlived all of the civilisations of antiquity, and whose government is to-day the oldest sovereignty on the globe.

One of the almost insurmountable difficulties heretofore confronting those who might wish to enter upon a study of Chinese law has been the absence of available material in any except the native language. The Chinese literature upon this, as indeed upon countless other subjects, is voluminous, not to say bewildering. But few would have the persevering ambition to acquire even a reading knowledge of the Chinese characters merely for the purpose of studying its legal literature. Fortunately, however, there has been accumulating for about a century past a new literature in Western languages, and it is mainly to call attention to this, and to place it at the

disposal of those desiring a general acquaintance with the subject, that the present article is intended.

The Law-giver of China.—Probably the best beginning for an outsider who would know something of the jurisprudence of China, or, for that matter, of almost any other feature of her marvellous and complex civilisation, would be a study of the discourses of Confucius, or rather those fragments of them which have been preserved. For, contrary to popular Western conceptions, Confucius was not a teacher of theology,[1] much less was he the founder of a religion. He was primarily a moralist, and seems to have approached from the ethical standpoint every subject which he discussed. Nevertheless, his teachings have profoundly affected Chinese thought on all subjects, and particularly on law.

"A quotation from Confucius has settled many a quarrel, arbitrated many a dispute."[2]

Moreover, Confucius became the highest judicial officer of his native state,[3] and his discourses reveal much enlightened concern for the conduct of its government in accordance with wise and lofty principles. We may instance the following:

Confucius, referring to the state of government in his native State, and that in a neighbouring State, remarked: "If Ts'i would only reform, she would have as good a government as Lu [Confucius's native State], and if Lu would only reform she would have a perfect government."[4]

[1] A disciple of Confucius remarked: "You will often hear the master speak on the subjects of art and literature, but you will never hear him speak on the subjects of metaphysics or theology."—*Discourses and Sayings of Confucius*, Ku Hung-ming's Translation (Shanghai, 1898), chap. v. sec. 12, p. 32.

"Confucius always refused to talk of supernatural phenomena; of extraordinary feats of strength; of crime or unnatural depravity of men; or of supernatural beings."—*Id.* chap. vii. sec. 20, p. 53.

The following passages appear to come the nearest to any of religious teaching:

"On one occasion when Confucius was sick, a disciple asked that he would allow prayers to be offered for his recovery. "Is it the custom?" asked Confucius. "Yes," replied the disciple; "in the Book of Rituals for the Dead it is written, 'Pray to the Powers above and pray to the Powers below.'"

"Ah," said Confucius then, "my prayer has been a long—lifelong—one."—*Id.* chap. vii. sec. 34, p. 57.

A disciple inquired what constituted understanding.

Confucius answered: "To know the essential duties of man living in a society of men, and to hold in awe and fear the Spiritual Powers of the Universe, while keeping aloof from irreverent familiarity with them; that may be considered as understanding."—*Id.* chap. vii. sec. 20, p. 44.

[2] Holcomb, *The Real Chinaman*, 45.

[3] "We find Confucius himself as Chief Justice to the State of Lu. His habit of introspection seems to have placed him on the road to the jury system, for, not content with his own mind, he had a habit of consulting seniors unconnected with the case before arriving at a decision."—Alabaster, "Notes on Chinese Law and Practice," *Journal of the North China Branch of the Royal Asiatic Society*, vol. xxxvii. p. 87.

[4] *Discourses and Sayings of Confucius*, Ku Hung-ming's Translation (Shanghai, 1898), chap. vi. sec. 22, p. 45.

The following rather lengthy passage can hardly be mutilated by abbreviation:

A disciple of Confucius inquired of him, "What should be done in order to conduct the government of a country?"

Confucius answered: "In the conduct of government there are five good principles to be kept in mind and respected, and there are four bad principles to be avoided."

"What are the five good principles to be respected?" asked the disciple.

Confucius replied: "First, to benefit the people without wasting the resources of the country; secondly, to encourage labour without giving cause for complaint; thirdly, to desire the enjoyments of life without being covetous; fourthly, to be dignified without being supercilious; fifthly, to inspire awe without being severe."

"But," again asked the disciple, "what do you mean by 'To benefit the people without wasting the resources of the country?'"

"It is," replied Confucius, "to encourage the people to undertake such profitable labour as will best benefit them, without its being necessary to give them any assistance out of the public revenue; that is what is meant by, 'To benefit the people without wasting the resources of the country.'"

Confucius then went on to say: "In the employment of the people in forced labour on works for the public good, if you select those who are most able to bear it, who will have any cause for complaint? Make it your aim to wish for moral well-being and you will never be liable to be covetous. A wise and good man, whether dealing with a few people or with many, with great matters or with small, is never presumptuous and never regards anything as beneath his notice or as unworthy of serious and careful attention; that is what is meant by being dignified without being supercilious. And, finally, to inspire awe without being severe, a wise and good man has only to watch over every minute detail connected with his daily life, not only of conduct and bearing, but even in minor details of dress, so as to produce an effect upon the public mind, which, without these influences, could only have been produced by fear."

"Now I understand," said the disciple; "but what do you mean by the four bad principles of which you have spoken?"

"First," replied Confucius, "is cruelty; that is, the undue punishment of crimes committed through ignorance arising out of a neglected education. Secondly, tyranny of that kind which renders people liable to punishment for offences without first clearly giving public notice. Thirdly, heartlessness; which means to leave orders in abeyance and uncertainty, and suddenly to enforce their performance by punishment. And lastly, meanness; to treat your subordinates as if bartering with them exactly and meanly; that is called behaving like professional men, and not like gentlemen."[1]

The foregoing quotations, it will be seen, deal largely with political science, or at most, with public law; they have little to do with what we now call private law, yet it is epigrams like these, brief statements of great principles, which have permeated the entire field of Chinese jurisprudence.

The works of Confucius were first made accessible to English readers by the translation of Dr. James Legge, more than half a century ago. But a later translator of the same race as Confucius himself has found much to

[1] *Discourses and Sayings of Confucius*, chap. xx. sec. 2, pp. 180-182.

criticise in Dr. Legge's version, and, being at once a Chinese and an English scholar, he has given us, naturally, the best key to the interpretation of the Great Sage, to use his own language:

> The attempt is therefore here made to render this little book, which, of all books written in the Chinese language, we believe, is *the* book which gives to the Chinaman his intellectual and moral outfit, accessible to the general English reader.[1]

The Chinese Corpus Juris.—The most comprehensive source for Western readers, in the study of what might be termed the Modern Chinese Law, is the so-called "Manchu Code" (Ta Ching Lü Li).

This was promulgated in the year 1647 of the Western Chronology, under the Emperor Shun Chi, the first of the late Manchu or Ching Dynasty. It may well be called the Chinese *Corpus Juris*, for it includes the original text (Lü) corresponding to the first three parts of Justinian's Pandects and the supplemental laws (Li) answering to the *Novellæ* of Justinian. The former (Lü)[2] were translated into English and published in London in 1810 by Sir Thomas Staunton, an attaché of the first British diplomatic mission to China (1793). A later investigator in the same field has observed of this effort:

> The fullest admiration is due to Sir George Staunton, the first translator of the Chinese Code, for his elegant work. It is a monument—a labour not sufficiently recognised. It is possibly not entirely accurate, as we now measure accuracy, and my own translations and notation are entirely independent of Sir George's. Indeed, I do not possess a copy, and my comments are based on recollection. But, considering that Sir George's work was produced a century ago, and that (so far as I know) no complete translation has since appeared, Staunton's exposition, though only of the *lü* and not of the *li*, is wonderful.[3]

Staunton's work was soon utilised by other Western scholars. A French translation of it by Felix Renouard de Sainte Croix was published in 1812, and later a Spanish translation,[4] probably from the latter, was rendered. The present writer's attention was first called to the work during a visit to China in 1907, when some material on this and kindred subjects was embodied by him into a magazine article.[5] It was not, however, until his transfer to China in the spring of 1914 that he was able to obtain a copy of the Staunton translation, and then only after considerable search and

[1] *Discourses and Sayings of Confucius*, Preface viii.

[2] "Staunton only translated the original kernel, or ancient 'statute' part of the law, much of which is obsolete; he left entirely untranslated what may be termed the judge-made or case law, which really forms the most important part of the work."—Edward H. Parker in *Law Quart. Rev.*, xxii. xxx. pp. 210, 211.

[3] Alabaster (Ernest), "Notes on Chinese Law and Practice, Preceding Revision," *Journal of the North China Branch of the Royal Asiatic Society*, xxxviii. p. 94.

[4] A copy of this is now in the government law library of Manila.

[5] "Law Reform in China," *American Monthly Review of Reviews*, xxxvii. p. 218.

inquiry. The work is out of print, and this fact, together with the now recognised inaccuracies, inevitable at the time of translation, would seem to call for a new edition.

Comments on the Code.—In his preface its famous translator said of it:

With all its defects, however, and with all its intricacy, this Code of Laws is generally spoken of by the natives with pride and admiration; all they seem in general to define is, its just and impartial execution, independent of caprice, and uninfluenced by corruption.[1]

Elsewhere[2] he is quoted as observing:

When we turn from the ravings of the Zend-Avesta, or the Puranas, to the tone of sense and business in this Chinese collection, it is like passing from darkness to light, from the dwellings of dotage to the exercise of an improved understanding; and, redundant and minute as these laws are in many particulars, we scarcely know a European Code that is at once so copious and so consistent, or is nearly so freed from intricacy, bigotry, and fiction.

A later investigator[3] says:

The Code, as we all know, is divided into six portions, dealing with Civil or Government, Fiscal or Popular, Ritual or Religious, Martial, the so-called "Criminal," and Public Works Law.

In all there are 427 articles, and, in my edition, about 2,000 Supplementary Laws. All classes are provided for, from high official to peasant; the note of the Code is indeed comprehensiveness combined with exactness. There is in this general connection a point to remark, *i.e.*, the sovereignty of the law. Military interference, for example, is not tolerated, and many cases bearing on the matter are quoted.

Chinese Legal History.—To begin the study of the jurisprudence of China with the Manchu Code would be like attempting to obtain a grasp of Roman Law from Justinian's Pandects—a method which is sometimes followed, and which accounts for the unsatisfactory results complained of in connection with Roman legal study. The Manchu Code, like the Justinian books, is the product of a long period of juridical evolution.[4] Neither can be understood without a comprehension of the forces and processes which brought them into being, and this requires a survey of the historical background.

[1] Staunton's Translation, xxviii.

[2] Holcomb, *The Real Chinaman.*

[3] Alabaster (Ernest), "Notes on Chinese Law and Practice," *Journal of the North China Branch of the Royal Asiatic Society*, xxxvii. pp. 90, 92.

[4] "So at the start there is the resemblance in the manner by which the present Chinese Code at its inception and Justinian's Codes were formed respectively [*v.* preface to original Chinese Code of present dynasty, A.D. 1647]—in either case a solicitous Emperor being aided by distinguished scholars. And of other likenesses in this connection: between the discouragement of publications additional to the Chinese Code (save by authority), and such in Rome; between the *Li*, and enactments supplementary to the Justinian Code; between the respective manners of legislating by edicts, decrees, and rescripts."—Alabaster, *Notes and Commentaries on Chinese Law* (London, 1899), pp. 615, 616.

Unfortunately, the materials for even a general history of the development of Chinese law are not yet accessible in Western languages. There have, however, been several sketches which have afforded a beginning, and which ought to be consulted by every student before entering upon the subject-matter of the legal system itself. And here, as in the enterprise last above mentioned, British investigators have been the pioneers. Sir Chaloner Alabaster, K.C.M.G., while British Consul-General in China, collected a vast amount of material on various phases of "Things Chinese," [1] and law was included.[2] His son, Ernest Alabaster, a barrister of the Inner Temple, has utilised and compiled this material in a treatise on special phases of Chinese law,[3] but with apparently little historical legal matter. Subsequently, however, the same author, apropos of the then contemplated changes in the law, contributed a rather lengthy review of Chinese legal history in the form of an interesting paper for the North China Branch of the Royal Asiatic Society.[4] We are also indebted to another Englishman, Mr. Edward H. Parker, for an interesting general sketch containing much historical matter relating to Chinese law.[5]

In a letter received under date of May 7, 1914, from Dean John H. Wigmore, of the North-Western School of Law, that eclectic and cosmopolitan investigator observed:

So far as I can find out, there is absolutely nothing in any language on primitive Chinese law, except one German essay. I mean law back in 500 or more B.C.

[1] The Chinese translator of Confucius observed:

"We take the opportunity here of paying our tribute of respect to the memory of an Englishman, Sir Chaloner Alabaster, who has at different periods published masterful translations of many portions of this book. When in Canton ten years ago we urged upon him to seriously undertake the translation of the Chinese sacred books, with Dr. Legge's translation of which we were both dissatisfied. But he was very conscientious. He said that his knowledge of Chinese books and literature was too limited; besides, that he was not a 'literary man.' He in turn advised us to undertake the work. Now, after ten years, just as we finish this first attempt to follow his advice, the melancholy news comes that he, to whom our little work would have been of some interest, has passed away from among living men."—*Discourses and Sayings of Confucius*, Ku Hung-ming's translation. Preface, p. ix. (Shanghai, 1898.)

[2] "Added to his knowledge and his mental endowments, Sir Chaloner Alabaster had also a lengthened experience of the East—extending from the middle fifties until the early nineties. During his life-time, Sir Chaloner, among his other literary enjoyments, made very many miscellaneous notes upon the Chinese legal system and its working, principally relating to the criminal portion of the law, and the result not only of study, but of observation."—Alabaster (Ernest), *Notes and Commentaries on Chinese Criminal Law and Cognate Topics*, Preface, p. vi. (London, 1899.)

[3] Alabaster (Ernest), *Notes and Commentaries on Chinese Law and Cognate Topics*, with Special Relation to Ruling Cases, together with a Brief Excursus on the Law of Property. (London, 1899.)

[4] "Notes on Chinese Law and Practice preceding Revision," *Journal of the North China Branch of the Royal Asiatic Society*, vol. xxxvii. pp. 83-149.

[5] "The Principles of Chinese Law and Equity," *Law Quarterly Review*, xxii. 190 *et seq.* (1906.)

Mr. T. R. Jernigan, formerly of the bar of North Carolina, afterward Consul-General of the United States at Kobe, Japan, later at Shanghai, and now a member of the bar of the United States Court for China, is the author of what may be called the latest general work relating to Chinese law as a whole.[1] About half of its fifteen chapters are devoted to legal topics.

Chinese Leading Cases.—Both English and American lawyers will find a striking analogy to a prominent feature of their own legal system in the Chinese use of adjudicated precedents, though with the latter the respect for precedent and written authority is much greater than with us. Some of these adjudications have been translated, and naturally afford the best material for the study not alone of the substance, but of the history as well, of Chinese law. As long ago as 1889, Mr. J. W. Jamieson, also of the British Consular Service, published certain translations, which, he says—

> Are taken from a Chinese collection of leading cases, the decisions in which, having been carefully revised and approved of by the Central Government, are held to establish precedents whose validity is equal to that of Statute Law.[2]

These precedents cover such subjects as the restitution of stolen property, the fraudulent sale of lands, etc.

Ten years later Mr. Ernest Alabaster, in publishing his well-known work above mentioned, included translations of a number of adjudicated precedents relating to inheritance, testamentary law, trusts, guardianship, etc.[3] It is evident from this meagre beginning that here is the most promising field for the investigator and student of Chinese law, and probably no undertaking would contribute so much to a general appreciation of its value as a more extensive translation and publication of these precedents. It is already evident that the inductive method of legal study, commonly known as the "Case System," now well-nigh universal in the best American law schools, and coming into use among the most advanced teachers of Roman law, is not only feasible, but essential to any satisfactory progress in the study of Chinese law.

The Chinese Family Law.—Foreign investigators appear to consider that they have found the *crux* of the legal situation of China in the family. One author[4] observes:

> With a precocity truly remarkable the Chinese people have made the family the base and the image of society.

Mr. Jernigan says:

> The members of a Chinese family are those who live as members of the same household, which include all who enter by marriage or adoption as well as slaves or

[1] *China in Law and Commerce.* (Macmillan Company, 1905.)

[2] "Chinese Law: Translation of Leading Cases," *China Review*, xviii. 33.

[3] *Notes and Commentaries on Chinese Criminal Law and Cognate Topics*, pp. 575-605. (London, 1889.)

[4] Scherzer, *La Puissance Paternelle en Chine*, p. 77. (Paris, 1878.)

servants. But this definition, while correct, is not sufficiently comprehensive as to the meaning of mutual responsibility as intended by the Code. It has been stated that the unit of social life in China is found in the family, the village, or the clan, and that these are often convertible terms, and this is specially true as relates to the doctrine of mutual responsibility. The responsibility of the family for the act of a member is most cruelly impressed, in the crime of high treason, in another section of the Code. This offence is committed either against the State, by overthrowing the established Government, or endeavouring to do so, or against the Sovereign, by destroying the palace in which he resides, the temple where his family worshipped, or the tomb in which the remains of his ancestors lie buried, or in endeavouring to do so. All persons who shall be convicted of having committed these execrable crimes, or having intended to commit them, shall suffer death by a slow and painful method, whether they be principals or accessories. All the male relatives in the first degree of the persons convicted of the above-mentioned crimes, the father, grandfather, and paternal uncles, as well as their own sons and grandsons, and the sons of their uncles, without any regard being had to their place of abode, or to any natural or accidental infirmities, shall be indiscriminately beheaded. All persons who shall know others guilty of high treason, or individuals having intent to commit such a crime, and who shall connive at the said crime, by not denouncing the authors, shall be beheaded." The responsibility of the family for a member who commits a lesser offence still follows; but of course the punishment is in accordance with the degree of the offence.[1]

In 1878, P. C. Von Mollendorff, a German Consul, read an essay before the North China Branch of the Royal Asiatic Society[2] at Shanghai, on the "Family Law of the Chinese." Nearly a score of years later this was amplified and reprinted separately in German[3] and English.[4] The same year in which von Mollendorff's essay first appeared, a work of analogous but less comprehensive scope was published by F. Scherzer.[5] Both of these works are written from the standpoint of Comparative Law (the first being arranged on the basis of the Roman law, "which, owing to its logical structure and general completeness, has become a typical system"). The author further says in his Preface:

> The frequent comparisons with Jewish and Roman Law have been made with the object of providing that the Chinese Laws and customs are pervaded by the same spirit of common humanity as those of other ancient peoples.

Mr. Scherzer, in concluding his monograph, observes:

> In China, as later in Rome, the paternal power was instituted not to protect the child, but solely in the interest of the father.[6]

Shortly after the appearance of these works, Mr. Edward H. Parker of the

[1] *China in Law and Commerce*, pp. 73, 74. (The Macmillan Company, 1905.)

[2] *Journal of the North China Branch of the Royal Asiatic Society* (Shanghai), vol. xiii. pp. 99-121.

[3] *Das Chinesische Familienrecht.* (Shanghai, 1905.)

[4] *The Family Law of the Chinese.* (Shanghai, 1896.)

[5] *La Puissance Paternelle en Chine.* (Paris, 1878.)

[6] *La Puissance Paternelle en Chine*, pp. 77, 78.

British Consular Service,[1] contributed[2] an extensive sketch of the Chinese family law from the comparative standpoint. More elaborate than any of the foregoing is a later work in French, but with ample use of Chinese texts, on the general subject of marriage in China.[3]

Property Law.—The author last mentioned also published a work on the law of property in China.[4] And if the family law has proven most attractive to scientific students of Chinese Jurisprudence, the law of property is surely the most important from a purely utilitarian standpoint. For not only are foreign property interests increasing in China, year by year, both in value and extent, but this branch of Chinese law is actually applied by foreign courts, including the American, which by virtue of the extraterritorial jurisdiction conceded by the treaties, have been sitting in China for many years. On most subjects, indeed, they apply the law of their respective sovereignties. As was said by a British Judge[5]:

> The Court administers the law of England (1865, Order-in-Council, art. 5), but what is the law of England in regard to immovable property situated within the dominions of the Emperor of China? Undoubtedly that rights in respect of such property shall be governed by the *lex situs*; that is, by the law of China.[6]
>
> To apply the law of English realty to land under the sovereignty of China is to disregard the distinction between the real and personal statutes—a fundamental principle of Private International Law which can be traced back through the legal history of the Western world to the time of the Roman Republic, and which is as necessary to-day as ever. It is true that our extraterritorial rights in China are not rooted in the history of Western law, as are those in the Levant, for they are the creatures of the Treaties with China, the earliest of which was ratified in 1842; but I think there is no doubt that the Orders-in-Council, from which this Court derives its jurisdiction, were framed on the long-established lines of an extra-territorial personal law. When article 5 of the Orders-in-Council of 1865 provides that His Majesty's jurisdiction shall, as far as circumstances admit, be exercised upon the principles and in conformity with the Common Law, the Rules of Equity, the Statute Law, and other law for the time being in force in and for England, it could not have been intended that the Court was to apply to land in China the English law in regard to land in England.[7] A well-known rule of construction requires that such an intention, being to change the Common Law, should be explicitly stated[8]: "It is in the last degree improbable that the Legislature would overthrow fundamental principles . . . without expressing its

[1] An excellent example of the value of the British and German requirements that Consuls, in China at least, must be lawyers.

[2] *The China Review*, vol. viii. pp. 68-107 (1879-80).

[3] Pierre Hoang, *Le Mariage Chinois au Point de Vue Légal.* (Shanghai, 1898.)

[4] Pierre Hoang, *Notions sur la Propriété en Chine.* (Shanghai, 1897.)

[5] Bourne, J., in *MacDonald* v. *Anderson*, British Supreme Court for China, 1904; reprinted in Hinckley's *American Jurisdiction in the Orient*, pp. 250-253.

[6] Story's *Conflict of Laws*, ch. x.; Hoffter, 42, v.; Dicey's *Conflict of Laws*, Rule 138; *Wushishan* case, *North China Herald*, xxiii. p. 90.

[7] Cf. Westlake, 3rd edition, p. 226.

[8] Cf. Story, p. 463.

intention with irresistible clearness."[1] The principle that land and its incidents are subject to the *lex situs* is not arbitrary, but founded upon cogent considerations of justice and convenience—one of the most obvious of which is that contiguous plots of land should be subject to the same law in regard to such incidents as prescription and servitudes. The land of British subjects at Tientsin is often conterminous with that owned by Frenchmen, Germans, and subjects of other Treaty Powers. If the home-land law of each proprietor is to apply to his land at Tientsin there will be different periods of limitation, prescription for servitudes, etc., according to the nationality of the owner for the time being. For example, the German period of limitation is thirty years with conditions,[2] and the French also thirty years,[3] while the English is twelve years; that is, a British subject could acquire a title to a part of his German neighbour's land by twelve years' possession, while the German could only get the same right by thirty years possession of the British subject's land, or the German might reduce the necessary period from thirty to twelve years by transferring the legal estate to a British subject. Such injustice and confusion must in any case throw doubt on a construction involving them; but I can find no colour for such a construction either in the Foreign Jurisdiction Act or in the China Orders-in-Council. The same reasoning excludes the law of the owner's domicile; and cf. *Doe, dem. Birtwhistle* v. *Vardill*, 5 B. & C. p. 451, per Abbott C. J. Moreover, supposing that we were in a *circulus inextricabilis* and that while English law applies the *lex situs*, the *lex situs* applies English law, that law cannot be the law of realty, and must, therefore, English law being *ex hypothesi* to be applied, be the law of personalty. For the distinction in English law between realty and personalty is not founded on principle, but is historically derived from the old forms of actions.[4] Realty included only interests in land for the enforcement of which a real action was available. But a real action in England was not opened to a plaintiff in regard to any interest in land and freehold, certainly not in regard to land under sovereignty of a foreign prince, a result utterly repugnant to feudal theory.[5] Therefore, foreign land cannot be realty in English law, unless explicitly made so by legislation. Supposing, then, English law has to be applied, land in China would fall under the same law as English chattels real, and for the same reason—that there would have been no real action open to the Plaintiff.[6]

Unfortunately, however, "Chinese land law consists almost entirely of local custom."[7] As long ago, indeed, as 1888, the Royal Asiatic Society, with characteristic prudence, procured and published reports on land tenure from a majority of the Chinese provinces.[8] But these were made, partly at least, by laymen, and are, partly at least, economic.

As already stated, Mr. Alabaster, in his work, includes a translation of adjudicated cases on Chinese property law. One of these must suffice.

In this case, Tsao Hsiao is uterine brother of Tsao Chi-hsien. Chi-hsien

[1] Maxwell's *Interpretation of Statutes*, 3rd edition, p. 113.
[2] German Civil Code, 927. [3] Napoleon Civil Code, 2268.
[4] Cf. Goodeve's *Real Property*, 3rd. ed., p. 6.
[5] Digby's *Law of Real Property*, p. 69.
[6] Cf. Williams, *Real Property*, 16th ed., p. 2. [7] *Id.*
[8] "Tenure of Land in China and Condition of the Rural Population," *Journal of the Royal Asiatic Society, North China Branch*, xxiii. pp. 59–183. Cf. An article on "Chinese-Conveyancing," 36, *American Law Review*, 825.

appears to be childless, and in easy circumstances; Hsiao to have two children, and to be utterly devoid of property—covetous, therefore, of the valuables his brother may leave behind him. Chi-hsien selling a piece of land belonging to him to the Military Doctor Lo Hung-pao, Hsiao holds that his brother's property is his, and outrageously prevented Hung-pao enclosing it, and Hung-pao brings an action against him. Before this is decided, Hsiao tries to influence me [to decree] that Chi-hsien dying childless his property goes to his brother. Chi-hsien, however, happens to be alive, and Hsiao has therefore no claim—and for attacking the purchaser when his attempt to get his brother's land from him has failed, he must be flogged.—Per Mao Tien-lai P."[1]

Criminal Law.—Sir George Staunton chose as his principal title for the "Ta Ching Lu Li," the "Penal Code of China," and Mr. Alabaster, as has been seen, selects as the chief title of his work, *Chinese Criminal Law*. But the latter adds this explanation in his Preface:

The term "Criminal Law" has in China a more comprehensive import than is the case with us. The Code, for instance, has a distinct division marked off as "Criminal Law," consisting of the discussion of such offences as homicide, larceny, etc. This division is of itself sufficiently comprehensive and bulky; but the Criminal Law is not only to be found herein, but is also stored away in all corners of the Code, in the Supplementary Laws, and in authoritative treatises.

Indeed to style the aforesaid division in the Code "Criminal Law" is confusing—and I have only done so in deference to custom.[2]

Nevertheless, one of the features that impresses a beginner is the highly penal character of Chinese legislation. Not only are its penalties Draconian in the extreme, but acts are given a criminal aspect which in Western law would be regarded at most as private wrongs. In this respect the Chinese conception seems to be the opposite of the Roman, for in the latter even larceny remained throughout a mere delict or tort. A few examples from Chinese adjudicated cases will serve to illustrate this difference:

"An Ch'i-so held, on lease from one of the Imperial Princesses, 99 mm. of land, which had been allotted to her by Imperial Decree and was thus Government property, so to speak. He was repeatedly called upon by the Prefect to give up the land and pay the due rent and on being arrested made his escape. After a few years he returned and again took possession of the land, alleging it to be his own property and refusing to pay rent for it, and at the same time inducing the other tenants to pursue a similar course. In accordance with the punishment due to all those who take possession of land in a Government settlement, if it be over 50 mm. in extent, he was sentenced to transportation to the nearer frontier.[3]

Sien I-Yüeh took possession of land which had formed in the middle of a river and proceeded to sell the same. On the appearance, however, of a proclamation by the District Magistrate forbidding such practices, he discontinued to sell. As his

[1] *Notes on Chinese Criminal Law*, etc., pp. 585–6 (London, 1899).

[2] *Notes and Commentaries on Chinese Criminal Law and Cognate Topics*, Preface, pp. viii., ix. (London, 1889.)

[3] Jamieson, "Translation of Leading Cases," *China Review*, xxviii., Par. 2, p. 35.

case differed from that of those who fraudulently take permanent possession of Government and other people's property, his punishment is reduced by one degree.[1]

But all this material has now become historical. In the last year of the Manchu régime, which was also the first of the Republic, a "provisional new Criminal Code" was promulgated. This is based largely upon the present Japanese penal code, which in turn was modelled upon that of Germany. Indeed, the resemblance between the Chinese instrument and the Japanese is so close that the former is little more than a translation of the latter, and this fact is attributed to the influence of Chinese students, who within very recent years have gone in such numbers to Japan and returned in time to take a prominent part in public affairs under the new Republican régime.

Other codes have been drafted and still others projected based upon similar models, but these have not as yet received force of law, and, in any event, are outside the scope of this discussion, which relates to native Chinese law. These newer codes are not Chinese, or even Oriental instruments. They are Western products, and, though filtered through Japanese sources, they will require pruning and modification before they can be even moderately well adapted to present conditions in China. It is well for her, indeed, that her present rulers have seen fit to call a halt, temporary though it may be, in the reckless process of ruthlessly uprooting ancient legal landmarks and substituting exotic codes which, however excellent in their place of origin, are quite out of harmony with Chinese conditions. That revision is needed is clear; but it would seem that the process would fare better under the friends than with the enemies of the time-honoured native, legal system. And when that revision comes let us hope that its results will show that China has not forgotten her very creditable legal history, nor failed to preserve and utilise all that is best in a legal system which can boast of greater antiquity than any the world has ever known.

[1] *China Review*, xxviii. Par. 5, p. 35.

RULE-MAKING IN THE COURTS OF THE EMPIRE.

[*Contributed by* SAMUEL ROSENBAUM, ESQ., *Gowen Fellow in the Law School of the University of Pennsylvania.*]

THE rule-making system developed by the English Parliament for the regulation of civil procedure was an experiment in legislation which has met with unbounded success. Not only has it been the opening wedge for an ever-increasing delegation of quasi-legislative powers to executive and judicial authorities (thus relieving Parliament of a multitude of statutory details), but it has been copied in the judicial system of practically every law-making unit in the widespread British Empire. Its general adoption shows that it has the merit not only of making procedure flexible and responsive wherever it is in force, but also of being suited to the most widely divergent local conditions. Some of the jurisdictions which have adopted it are populous modern industrial communities, while others are pioneer settlements only just maturing into the dignity of established institutions. With the exception of half a dozen scattered colonies, procedure is no longer regulated by statute anywhere in the Empire, but is subject altogether to Rules of Court alterable by the local judges with the approval of the local executive.[1] In four governments the legislature has added to the judges several practitioners who share the rule-making power, as in the English Rule Committee,[2] and in one other there is a requirement, as in England, that all statutory Rules must be published in draft in advance of their actual promulgation.[3]

From a comparative point of view an inspection of the numerous Acts and Ordinances which have brought about this result is of interest, as it reveals many variants from the original model,[4] some of which are not without instructive value.

[1] In Hong Kong, the Straits Settlements, Barbados, and St. Lucia there is a statutory Code of Civil Procedure, drawn, however, very largely from the English R.S.C. In Quebec and in the Seychelles the Code of Civil Procedure is French; in Malta it is Italian. In Prince Edward Island and in New South Wales the procedure is regulated largely by scattered statutes, and only to a small extent by Rules of Court, as in England under the Common Law Procedure Acts. Common law and equity are still administered separately in Prince Edward Island, New South Wales, Barbados, and Tasmania.

[2] Ireland, India, Newfoundland, and Ontario.

[3] The Commonwealth of Australia.

[4] The English rule-making system is governed at present by s. 17 of the Judicature Act, 1875, s. 19 of the Judicature Act, 1881, s. 1 of the Judicature Act, 1909, and the Rules Publication Act, 1893.

Ireland.—The judicature of Ireland, though entirely independent of that of England, is built up on very similar lines. In 1877 a Judicature Act[1] introduced into Ireland all the reforms effected in England by the Acts of 1873 and 1875, so that there is now a consolidated Supreme Court in Dublin. The Irish Act, like the first English one, gave the power to make Rules of Court to a majority of all the judges of the Supreme Court. The clause reads[2]:

> The Lord Lieutenant may . . . by Order-in-Council, made upon the recommendation of the Lord Chancellor, the Lord Justice of Appeal, the Chief Justice, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron, or any three of them, and of the other judges of the several Courts intended to be united and consolidated by this Act, or of a majority of such other judges, make rules, to be styled Rules of Court, for carrying this Act into effect, etc.

The more compact Rule Committee, containing a part only of the judges, as established in England by the Acts of 1876 and 1881, has never been copied in Ireland; but in 1897 the Irish did copy the English Act of 1894[3] by adding three practitioners to the rule-recommending body[4]:

> The persons upon whose recommendation the Lord Lieutenant may make, alter, or annul rules . . . shall include the President of the Incorporated Law Society of Ireland, and two persons (one of whom shall be a practising barrister) to be appointed for the purpose by the Lord Chancellor, by writing under his hand, for such time as may be specified by him.

The practice, as under the English Act, has been that both of the two other persons appointed have been practising barristers; their appointment has usually been for a period of two years, subject to renewal with their consent. There is no pecuniary emolument attached to membership in the body. The subsequent English Rule Committee Act of 1909 has not yet been copied by the Irish.[5] As at present constituted the Irish rule-recommending body consists of seventeen persons, of whom three are engaged in practice. Of these, one, the President of the Law Society, changes annually, and another, the Lord Chancellor, changes according to the political colour of the Government at Westminster. The others are practically all life members, as the barrister members are often promoted to judgeships.

The powers of the Irish Rule Committee, if it may be so styled, are far more extensive than those reposed in the Rule Committee in England. Several branches of procedure for which in England rules are prescribed by authorities other than the Rule Committee are entrusted to the Irish

[1] Judicature (Ireland) Act, 1877, 40 & 41 Vict. c. 57.
[2] S. 61. [3] 57 & 58 Vict. c. 16, s. 4.
[4] Judicature (Ireland, No. 2) Act, 1897, 60 & 61 Vict. c. 66, s. 12.
[5] The wishes of the Irish bench and bar are approximately represented in the present judicature legislation, as most of it has been drafted upon suggestions from Dublin.

Committee. It is probably for this reason that, although in England the Rule Committee is itself the authority which issues the Rules, in Ireland the "recommendations" of the Committee must be ratified by an Order-in-Council before they have the force of law. The most important of these are proceedings in bankruptcy and in winding-up of companies,[1] for both of which the Board of Trade has been given the power to make a considerable body of Rules in England, and divorce and probate proceedings, which in England are regulated by the President of the Probate Division alone. The Irish Rules are also more detailed in regard to proceedings in the law of landlord and tenant, as the Irish conditions differ so greatly in this regard from the English. There is, however, one limitation upon the Irish committee's discretion, in that it is required to pay attention to the state of procedure in England, in the exercise of its powers[2]:

> In making, altering, or annulling Rules of Court in pursuance of this Act, regard shall be had to the Rules of Court for the time being in force under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, so that the pleading, practice, and procedure in the High Court of Justice and Court of Appeal respectively constituted by this Act shall, so far as may be practicable and convenient, having regard to the difference of the laws and circumstances of the two countries, be the same as the pleading, practice, and procedure of the High Court and Court of Appeal respectively constituted by the said Acts.

For this reason many of the fundamental Rules of procedure were copied *verbatim* from the English R.S.C.[3] There is also the requirement that Rules made must be laid before Parliament for forty days, during which time they are liable to be annulled, and the provisions of the Rules Publication Act, 1893, apply to these, as to all statutory rules in the United Kingdom.

Except for the direction above quoted there are no statutory regulations for the conduct of the Rule Committee's affairs, so that, like the English Committee, it meets not at fixed times but at the call of the Lord Chancellor as occasion demands and opportunity offers. It draws suggestions, in much the same way, from the various official bodies representing the profession, and from the lay public. In addition, the secretary to the Committee, who is also the Permanent Secretary to the Irish Lord Chancellor,[4] is informally in communication with the secretary to the English Committee, who advises him

[1] The present Winding-up Rules (Order 74) were issued June 27, 1910, so they will not be found in the 1906 edition of the R.S.C. They are in 125 Rules and 63 Forms, practically identical with the English Rules.

[2] S. 61 of the Act of 1877.

[3] Nearly all Rules for the operation in Ireland of special statutes copy *verbatim* the corresponding English Rules. For instance, the Rules for the Patents and Designs Act, 1907 (English Order 53A, Rules 9-24, Irish Order 88A, May 17, 1910); for sec. 66 of the National Insurance Act, 1911 (English Order 55B, Irish Order 54D, July 8, 1912); for sec. 33 (4) of the Finance (1909-10) Act (English Rules of 1912, Irish Order 68, June 6, 1913).

[4] For nearly thirty years this post has been held by J. Nugent Lentaigne, Esq.

whenever the latter Committee is considering or has passed amendments likely to be of interest to the Irish judges. Upon taking up the consideration of any proposed new Rules the Committee usually in the first instance refers the matter to a sub-committee of its own members to prepare the draft rules for submission to the general body; there is no permanent draftsman attached to the Committee, but Treasury sanction has on many occasions been obtained for the employment of a barrister to assist the Committee where the work of drafting was likely to be heavy or difficult. It may be noted that because of its smaller size the English Committee seldom refers matters to a sub-committee. It has been found in Ireland that the three practitioner members of the Committee take a very active part in its work, and they are placed on all its sub-committees.

Attached to the Act of 1877 was a Schedule of Rules which went into effect together with it. It contained thirty-eight short Rules, drawn from the Rules in the English Schedule of 1875, and they were only intended to remove contradictions in the procedures of the Courts consolidated by the Act; they left nearly all the old procedure untouched. Numerous changes in succeeding years made necessary a consolidation and revision in 1891, which was carried out similarly to Lord Selborne's revision of the English Rules in 1883, and combined with the R.S.C. the bulk of the miscellaneous Rules in bankruptcy, probate, etc. Many Rules were also copied at that time from the English R.S.C. 1883. In 1905 the Irish R.S.C. were once more completely revised, so that they are now less free of anachronisms than the Rules in England. On both of those occasions the services of a barrister to assist the Committee in the drafting and in the manual work were obtained. Amendments to the R.S.C. 1905 are not frequent enough to make necessary the publication of an annual work like the English White Book; the last annotated edition of the Irish Acts and Rules was published in 1906.[1]

As in England, there is a system of local Courts in Ireland, the procedure in which is regulated by a small committee of judges. The Courts are called Civil Bill Courts and each is presided over by a Chairman. The County Officers and Courts (Ireland) Act, 1877, grants the power to make rules for the Civil Bill Courts to the Lord Chancellor and five of the chairmen "to be selected at a meeting of the chairmen convened for the purpose."[2] This corresponds to the Committee of five County Court judges who have exercised similar powers in England since 1849, although the members of the English Committee are designated by the Lord Chancellor.

Isle of Man.—Another portion of the United Kingdom where, in spite of a Judicature Act of the modern type, picturesque old titles persist, is the Isle of Man. The House of Keys passed a Judicature Act in 1883, establishing

[1] The Judicature Acts and Rules, Ireland (Dublin, 1906), by Mr. J. O. (now the Rt. Hon. Mr. Justice) Wylie (then a barrister member of the Rule Committee). For Rules since 1905 see the Annual S. R. & O.

[2] 40 & 41 Vict. c. 56, s. 79.

a High Court in the island with combined powers in common law and equity, and bestowing the power to make and alter Rules of Court, to regulate procedure, upon "the Governor, with the advice and assistance of the other judges of the High Court, or of any two of them."[1] There are four judges in the Manx High Court—the Governor, the Clerk of the Rolls, and two Deemsters.

Scotland.—To English common-lawyers Scotland is a land full of mystery and romance. The organisation of its legal profession, of its Courts and of their procedure, like its substantive law, differs from that of England in nearly every outward sign. Hidden behind a strangely sounding and quaint nomenclature there are doubtless many fundamental similarities, but they are safe from detection except by curious and patient research. Whatever the content of Scottish civil procedure may be, its development is regulated in a manner very similar to that made familiar by the English Judicature Acts, that is by the action of the judges. But the method as applied in Scotland far antedates the Judicature Acts; in fact, some Scottish writers claim for the Scottish Courts that the English legislators copied them in this respect.[2] For nearly four hundred years the Scottish judges have regulated the course of all proceedings before them under an authority formally delegated to them by the Crown and confirmed by Parliament. In the statute of May 17, 1532, which created the Scottish Court of Session, a power was conferred upon the King to lay down rules of procedure for the conduct of causes, and this power the King magnanimously delegated to the Chancellor, President, and Lords of Session upon the occasion of the inauguration of the Court. Under this authority the judges made and issued rules styled "Acts of Sederunt" (from the name of the Court). These were ratified by the Statute of 1540, c. 93, which also transferred completely to the judges the power to continue to make such Acts of Sederunt, "for the ordering of process and hasty expedition of justice." This power was freely exercised by them, sometimes being deliberately construed so as to enable the judges to make rules which amounted to substantive law, as when in 1662 they "simplified the law by which the estate of a deceased debtor might be made available to his creditors."[3] Even at the present day nearly all alterations in procedure are effected by Acts of Sederunt, and modern statutes which throw special duties on the Courts, requiring Rules to be passed for proceedings under them, provide that in the case of Scotland the Rules should be made "by Act of Sederunt."[4] Published collections,

[1] Isle of Man Judicature Act, 1883, s. 35. Gill's *Statutes of the Isle of Man*, vol. v. p. 222.

[2] See Brodie-Innes, *Comparative Principles of the Laws of England and Scotland* (Edinburgh, 1903), p. 304.

[3] Act of Sederunt, February 28, 1662. See Green's *Encyclopædia of Scots Law* (Edinburgh, 1909), vol. i., and Mackay, *Practice of the Court of Session* (Edinburgh, 1877), vol. i. p. 5.

[4] See sec. 11 (*b*) of the Guardianship of Infants Act, 1886, 49 & 50 Vict. c. 27, and sec. 42 (1) of the Finance (1909-10) Act, 1910, 10 Ed. VII. c. 8.

called Books of Sederunt, are extant of all the Rules so issued since 1532.[1] There seems, however, to be no clear line of demarcation between the scope of Acts of Sederunt and of Acts of Parliament, as it is not unusual for changes to be made in details of Scottish civil procedure by Act of Parliament, even at the present time.

In the self-governing Dominions the delegation by the legislature to the Courts of the power to regulate procedure has been almost universal. With the exception of Quebec, Prince Edward Island, and New South Wales, every provincial and federal legislature has acknowledged the wisdom of leaving a technical subject like civil procedure to those who understand it.

Canada.—In Canada the Dominion and all but two of the Provinces have some form of Judicature Act in which the judges are empowered to regulate procedure. In Quebec there is a statutory Code of Civil Procedure[2] in which the forms of proceeding correspond to those in the French Code and are wholly independent of the English R.S.C.[3]; in Prince Edward Island the old courts of law and equity are still separate, and the modern English Rules could have no application.

In two of the Provinces the rule-making authority is reposed in a committee of which both judges and practitioners are members. These are the only instances (together with India) in which this characteristic of the English Rule Committee has been copied outside the United Kingdom. Newfoundland was the first to adopt it, in 1899. There was then already a Judicature Act which had thrown all procedural matters into a Schedule of Rules subject to alteration by a majority of the judges.[4] In 1899 an amending Act added to the judges the following persons to assist in making Rules[5]:

> The Chief Clerk and Registrar of the Supreme Court (being a barrister), and two other Benchers of the Law Society to be from time to time appointed for the purpose by the Chief Justice, in writing under his hand, such appointment to continue for such time as shall be specified therein.

The Act at present in force is the Judicature Act, 1904, which consolidated the two previous ones and made additions to the Schedule of Rules.[6]

Ontario.—In Ontario, where a modified copy of the English Judicature

[1] Acts of Sederunt from May 1532 to January 1553, published by L. P. Ilay Campbell, 1811; from January 1553 to July 1790, by William Tait, 1790; from July 1790 to July 1831, by the Faculty of Advocates, 1831; a complete abridgment from the beginning to 1886 is Alexander's Abridgment of Acts of Sederunt.

[2] Code of Civil Procedure, 1897.

[3] The judges are empowered by the Code, ss. 73-5, to make minor Rules of Practice not incompatible with the Code. A collection of such Rules, 1850-92, has been published in a separate volume.

[4] Judicature Act, 1889, c. 50 of the Consolidated Statutes, ss. 146-51. A Schedule of fifty-five Orders, with Forms, based on the English R.S.C. 1883.

[5] Judicature Amendment Act, 1899, 62 & 63 Vict. c. xiii. s. 1.

[6] 4 Ed. VII. c. 3, ss. 272-6. A schedule of sixty-four Orders.

Acts was passed as early as 1881, the Rule Committee device was not adopted until the revision of 1913. The first Ontario Act gave the judges the rule-making power, and was accompanied by a set of Orders and Rules based on the English R.S.C.; these were consolidated with the amendments and re-issued in 1888, upon the occasion of an amendment to the Act. In 1895 there was a new Judicature Act, under which a second revision of the Rules was published in 1897. Both these were repealed by the present Judicature Act of 1913[1] and the new Rules prepared under it. That Act sets up two authorities by which the Rules may be subjected to alteration. The first is the usual one, the judges of the Supreme Court, who

> may at any time amend or repeal any of the rules . . . and may make any further or additional rules for carrying this Act into effect, and in particular . . . for regulating any matters relating to the practice and procedure of the Courts mentioned in clause (b), or to the duties of the officers thereof, or to the costs of proceedings therein, and any other matter deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect the provisions of this Act and of all other Acts respecting such Courts. . . .[2]

It may be remarked that the "Courts mentioned in clause (b)" include not only "the Supreme Court and the Divisions thereof," but also "the County and Surrogate Courts," so that there is not a separate authority to make Rules for the local tribunals as there is in England. But in addition to the above there is this provision in the Act[3]:

> (1) The Lieutenant-Governor in Council may from time to time authorise the Chief Justices, including the Chancellor, if any, *and any one or more* of the other Judges of the Supreme Court, and the Treasurer of the Law Society of Upper Canada, and any two barristers-at-law of Ontario, to make rules under this Act; and every appointment so made shall continue for the time specified in the Order-in-Council.
>
> (2) The persons so appointed, or any three of them, may make such Rules. . . .

This special Rule Committee differs from the English Committee in three essential particulars: it is appointed by the Executive and not by a judicial officer; its size is not fixed, as the Executive may appoint "one or more of the other judges," and may vary the number "from time to time"; the powers reposed in the Committee may be exercised by "any three" of its members. Conceivably, then, the three practitioner members of such a Committee could pass Rules to which all the judges might object. In England, of the twelve members in the Committee, eight are judges and four practitioners; to pass a Rule requires the assent of at least five members, of whom the Lord Chancellor must be one.[4] No examples of Rules passed under the Ontario invention have as yet come to hand.

[1] 3 & 4 Geo. V. c. 19. [2] S. 111 (1) (g). [3] S. 112.
[4] S. 19 of the Judicature Act, 1881.

Manitoba.—No less original a departure from the English rule-making system is presented in the practice of three Canadian Provinces whose legislatures, although they have expressly delegated to the judges the power to make Rules governing all the procedure in their Courts, continue to pass Acts making alterations in the rules of practice. The originator of this curious anomaly was Manitoba. The consolidated King's Bench Act of 1902 [1] bestows upon a majority of the judges of the Court "present at any meeting held for that purpose" [2] the power to alter or annul any Rules in force, and to make any additional Rules necessary. The Act carries with it a schedule of 993 Rules and 155 Forms, largely drawn from the English R.S.C. and the Ontario Rules of 1897. But in the very same year the provincial legislature, in spite of its delegation of authority, passed an Act amending certain Rules in the schedule [3]; and since then alterations have been made by the legislature at every succeeding session except that of 1907.[4] The legislature has altered or added over 175 Rules, and no amendments appear to have been issued by the Supreme Court at all.[5] This would seem to defeat all the objects for which it was deemed necessary to give the judges complete power over procedure—to prevent meddling by non-professional authorities, and to relieve the legislature of the burden of technical details.

Nova Scotia and New Brunswick.—Nova Scotia and New Brunswick are the other two Provinces where the judges both do and do not regulate procedure. In the former there is a Judicature Act, 1900,[6] with a Schedule of seventy Orders, based, like Manitoba's, on the English and Ontario Rules. The judges are empowered by the Act [7] to make rules of practice altering the Rules in the schedule, and from 1900 to 1911 they issued twelve such amendments. But that did not prevent the legislature from expressing its own opinion about several of the Rules, for it has passed three Acts [8] introducing alterations of its own. In New Brunswick the legislature seems particularly fickle, as it allowed only three years to intervene between the last two complete revisions of its Judicature Act, and even since the latest (that of 1909) an Act has been passed altering the Rules in the schedule. The present Act,[9] replacing the Act of 1906,[10] gives the judges the power to make Rules for all purposes,[11] and carries with it a schedule of seventy-two Orders which closely follow the English R.S.C. and to a lesser

[1] C. 40 of the Revised Statutes, 1902, consolidating the Acts of 1895 (58 & 59 Vict. c. 6) and 1900 (1 Ed. VII. c. 6).

[2] S. 63. [3] Act 6 of 1902.

[4] Acts 11 of 1903, 8 of 1904, 6 of 1905, 17 of 1906, 11 to 14 of 1908, 13 and 14 of 1909, 17 of 1910, 12 to 14 of 1911, 15 and 14 of 1912, and 12 of 1913.

[5] In 1911 a volume was published in Winnipeg containing the Act as amended up to that date.

[6] Revised Statutes, 1900, c. 155, replacing the Act of 1884, 47 Vict. c. 25, and Schedule of Rules, which appeared in the old Revised Statutes as c. 104.

[7] S. 45. [8] Acts 15 and 16 of 1901, and 17 of 1904.

[9] 9 Ed. VII. c. 5. [10] 6 Ed. VII. c. 35. [11] S. 50 (1).

extent the Ontario Rules. In 1913 six of the Rules in the schedule were altered by statute.[1] Another remarkable point in New Brunswick is that under the present Act Rules of Court may alter not only the Schedule of Rules but the provisions in the body of the Act itself. This carries the rule-making power very far, as the Act is of the usual type defining the organisation of the Court, its jurisdiction, its divisions, and the duties of its officers. However, the judges do not appear so far to have issued any amendments under the section, either to the schedule or to the Act itself.

Alberta.—In Alberta too the legislature has continued to enact amendments to a Schedule of Rules, although it apparently delegated that power away from itself. The Province was formerly part of the North-West Territories, for which there was a Judicature Ordinance with a schedule of 47 Orders containing Rules and Forms.[2] The Ordinance empowered the judges to regulate procedure by altering or adding to the Rules in the schedule.[3] When the Provinces of Alberta and Saskatchewan were carved out of the larger area each passed a Judicature Act setting up a Supreme Court of its own and adopting *in toto* the Rules in force under the older Ordinance. The Alberta Act then provided that, as to amendments after 1907[4]:

> The Lieutenant-Governor in Council may from time to time make and authorise the promulgation of Rules of Court . . . and may alter and annul any Rules of Court or tariff of costs or fees for the time being in force . . . and may make any further or additional Rules for carrying this Act into effect, or may authorise the judges of the Court to make and promulgate such Rules. . . .

So that the delegation of rule-making power to the judges is not direct, but discretionary with the Lieutenant-Governor in Council. However, the Act expressly allows the latter authority complete control over rule-making, so it is rather a surprise to find that on three occasions since 1907 Acts have been passed by the legislature to amend parts of the Schedule of Rules.[5] There have also been some amendments made by Orders-in-Council. The Saskatchewan Act[6] differs from the Alberta statute in expressly empowering the judges to make alterations in and additions to the Schedule of Rules[7]; but it also gives the Lieutenant-Governor in Council a concurrent power to do so.[8] In 1911 a revised set of Rules for Saskatchewan was issued by the latter authority, in fifty-four Orders based on the English and Ontario Rules.[9]

British Columbia.—In British Columbia the judges are not mentioned in the rule-making section of the Act at all. The power is ostensibly given

[1] Act 23 of 1913.
[2] Consolidated Ordinances, 1898, c. 21. Repeated, with all amendments, in the Consolidated Ordinances, 1907.
[3] Ss. 20-22.
[4] Supreme Court Act, c. 3 of 1907, s. 24.
[5] Acts 5 of 1907, 4 of 1909, and 4 of 1911-12.
[6] Judicature Act, 1907, c. 8 (Revised Statutes, 1909, c. 52).
[7] S. 55 (2).
[8] S. 55 (5).
[9] The Rules are published in a separate volume.

solely to the Lieutenant-Governor in Council.[1] It is in fact exercised by him, however, only upon the recommendation of the judges.[2] A set of Rules was published under the present Act in 1906, in seventy-two Orders with Forms.[3] In the Yukon Territory the Judicature Ordinance[4] authorises the judges of the Territorial Court to alter or add to the Rules in its schedule—629 Rules grouped into forty-seven Orders with Forms, based on the English R.S.C.

The Supreme Court of the Dominion of Canada, first established in 1875,[5] is purely an appellate tribunal, and it has the power to prescribe rules for all proceedings brought before it.[6]

Australia.—In Australia the statutes creating the High Court of the federation are of interest because they introduce one important element of the English rule-making system not copied in other parts of the Empire—the publication of draft Rules in advance of their final promulgation. The Commonwealth is the only jurisdiction outside the United Kingdom which has passed a Rules Publication Act; the Australian Act[7] requires publication of all statutory Rules in draft sixty days before they are made—an increase of twenty days over the period required by the English Act, because of the greater distances for the transmission of criticisms. Another improvement in the Commonwealth Acts creating the High Court is that the usual Judicature Act is split into two parts independent of each other. One is called the Judiciary Act[8] and deals solely with the organisation of the Court, the duties of its members and officers, the sittings, the distribution of business, the qualifications of practitioners, and costs and fees; the other is named the High Court Procedure Act[9] and is confined to matters of procedure, fixing certain definite principles in the body of the Act, and throwing all the procedural details into a schedule of fifty-seven Orders.[10] Both Acts expressly delegate to the judges the power to make Rules of Court for all purposes connected with their operation, and for altering or adding to the schedule of procedural Rules.[11] Numerous Rules have been issued under both Acts, which

[1] Supreme Courts Act, 1903-4, 3 & 4 Ed. VII. c. 15 (Revised Statutes, 1911, c. 58). This replaces the previous Act and Rules of 1890 (Revised Statutes, 1897, c. 56).

[2] Amendments have been made by Orders-in-Council in 1906, 1908, and 1910.

[3] Published, Vancouver, in a separate volume.

[4] Consolidated Ordinances, 1902, c. 17, s. 14.

[5] The first statute was re-enacted in the Revised Statutes, 1886, as c. 135; amended in 1891 and 1906; consolidated as Revised Statutes, 1906, c. 139—the present Act.

[6] S. 109 of the present Act. In 1907, 143 Rules were issued by the Court to regulate appeals.

[7] Rules Publication Act, No. 18 of 1903, s. 3 (1).

[8] Judiciary Act, 1903-10 (as amended). See Acts of the Commonwealth, 1901-11 (Melbourne, 1913). The title is copied from that of the United States Federal Act.

[9] High Court Procedure Act, 1903.

[10] Part I., Original Jurisdiction, 57 Orders; Part II., Appellate Jurisdiction, 5 Orders. Numerous amendments made from 1903 to 1912 are incorporated in the schedule as printed in the Act in the 1913 Acts of the Commonwealth.

[11] Judiciary Act, s. 86; Procedure Act, s. 33.

are published in separate volumes of Statutory Rules and Orders.[1] The English method of delegating away from Parliament the power to settle innumerable small details of legislation, to be issued in the form of Statutory Rules, is followed in the Commonwealth Parliament, and, as in England, the Courts are constituted the rule-making authority in all statutes in which they are called upon to fulfil duties under the Act. One example is the Service and Execution of Process Acts,[2] which make it possible to serve the legal process of any State in the federation in any other State, under Rules to be prescribed for that purpose by the Supreme Court in each State.[3]

With the exception of New South Wales and Tasmania all the constituent States of the Commonwealth have passed some form of modern Judicature Act. In New South Wales practically all the Rules of civil procedure are in statutory form, the rule-making power of the judges being limited to such matters as it extended to in England under the Common Law Procedure Acts. In fact as recently as 1899 New South Wales passed a Common Law Procedure Act [4] which repeated a large number of sections from the English Acts of 1852, 1854, and 1860. In it the judges are authorised to make Rules of Court not inconsistent with the Act.[5] Law and equity are still administered separately in New South Wales. Tasmania passed a Supreme Court Act in 1856,[6] under the influence of the first Common Law Procedure Acts and has not since then altered the constitution of the Court. Law and equity are still separate in Tasmania, the procedure on each side being regulated by Rules and Orders made under the authority of the Act of 1856.[7]

The other four States have Judicature Acts, with Schedules of Rules which are subject to alteration by the judges, modelled after the English Act of 1875. The Queensland Act was passed in 1876.[8] The Schedule of Rules was revised and re-issued in 1900,[9] and opens with this interesting modification of the English summons for directions :

> When a party desires to take a step in a cause or matter, and the manner or form of procedure is not prescribed by these Rules or by the practice of the Court, the party may apply to a judge for directions, and any step taken in

[1] The Rules under the Judiciary Act are Statutory Rules No. 50 of 1904, 125 of 1907, 35 of 1908, 130 of 1910, and 330 of 1913. Rules under the Procedure Act are incorporated in the reprinted schedule.

[2] Service and Execution of Process Acts, 1901-12, Sessional Acts, vol. xi. 1912.

[3] S. 27 (1).

[4] No. 21 of 1899.

[5] Ss. 268-70.

[6] 19 Vict. No. 23.

[7] S. 6. Under this the Common Law Rules were published April 28, 1856, based on the English Regulæ Generales, and the Equity Rules, April 7, 1864, based on the Consolidated Orders of the Court of Chancery. The judges have also issued voluminous Rules under the Small Debts Act, 1867, and the Bankruptcy Act, 1870, and Rules for the conduct of matrimonial causes, in 1878.

[8] 40 Vict. No. 6 ; rule-making power in s. 17.

[9] Appendix III. to Acts of 1900 ; ninety-four Orders, with Forms.

accordance with the directions given by the judge shall be deemed to be regular and sufficient.[1]

The South Australia Act was passed in 1878,[2] and under it General Rules were published March 1, 1879, in fifty-nine Orders drawn from the English Schedule of 1875. Additional Orders, up to the seventy-ninth, were added in 1884 and 1893, partly inspired by amendments to the English R.S.C. Western Australia passed its Supreme Court Act in 1880,[3] under which the judges later issued seventy-two Orders based on the English Rules. Victoria's first Judicature Act was passed in 1883,[4] and a code of Rules framed thereunder was issued by the judges in the following year. The present Act is of 1890,[5] and a new set of Rules has been issued under it repealing the older one.

New Zealand's Judicature Act[6] treats in Part I. of the Supreme Court, with original jurisdiction, and in Part II. of the Court of Appeal, the appellate tribunal, although the same judges sit in both Courts. So also there are two Schedules of Rules, one for original, the other for appellate proceedings.[7]

South Africa.—In South Africa the power of the judges to regulate pleading and procedure, as well as the details of practice, is old and well established. In the 1834 Charter of Justice for the Cape Colony appears this comprehensive section, which has been copied almost *verbatim* in the High Court Acts of the several provinces[8]:

It shall be lawful for the members of the High Court, or the majority of them, to frame, constitute, and establish such Rules, Orders, and Regulations as to them shall seem meet touching and concerning the time and place of holding the said Court and the District Courts; the form and manner of proceeding to be observed in the said Courts respectively; the practice and pleading upon all actions, suits, and other matters of a civil nature to be therein brought; the appointing of commissioners to take bail and examine witnesses; the examination of witnesses *de bene esse* and allowing the same as evidence; the proceedings of the sheriff and other ministerial officers of the said Courts respectively; the process of the said Courts and the mode of executing the same; the summoning of witnesses; the procedure with regard to the admission of advocates, attorneys, conveyancers, and notaries public, and other officers of the said Courts; the suspension from the right to practise, or the cancellation of admission to practise in the said Courts of advocates, attorneys, notaries public, and conveyancers; the fees to be lawfully demanded by and

[1] This is signed by Sir Samuel Walker Griffith, now Chief Justice of the Commonwealth.

[2] Supreme Court Act, No. 116 of 1878; rule-making power in s. 29.

[3] 44 Vict. No. 10; rule-making power in s. 24.

[4] 47 Vict. No. 761.

[5] Supreme Court Act, 1890, 54 Vict. No. 1142; rule-making power in s. 23.

[6] No. 89 of 1908. Rules for the Supreme Court are made by the judges under s. 51, and for the Court of Appeal under s. 71. This Act and the Rules supplant the prior Act and Rules of 1882.

[7] 607 Rules, with Forms, for the Supreme Court; forty-nine Rules for the Court of Appeal; largely influenced by the English Rules.

[8] S. 46.

payable to any officers or attorneys in the said Courts respectively; the manner of recording and noting evidence of the proceedings in the said Courts; and touching and concerning all such other matters and things necessary for the proper conduct and dispatch of business in the said Courts.

Provided always that no such Rules, Orders, and Regulations shall be repugnant to the provisions of this Charter, and that the same shall be so framed as to promote, as far as may be, economy and expedition in the dispatch of the business of the afore-mentioned Courts respectively, and that all such Rules and Forms of practice, process, and proceeding shall, so far as the circumstances of the said Colony shall permit, be framed with reference to the corresponding Rules and Forms in use in our Courts of Record at Westminster, and that the same be drawn up in plain, succinct, and compendious terms, avoiding all unnecessary repetitions and obscurity, and promulgated in the most public and authentic manner in the said Colony, for three months at least before the same shall operate and take effect.

This wide power enabled the judges to mould procedure before them so as most easily to combine the Roman-Dutch law which is the basis of jurisprudence at the Cape with the English common law superimposed upon it. When the judicature of the Cape Colony was remodelled in 1896 the old rule-making section was incorporated into the new Act by reference.[1] In the same year the Supreme and Circuit Courts of Natal were consolidated in a Judicature Act which contains a section repeating practically the whole of the rule-making section of the Charter of 1834.[2] Two years later an Order-in-Council creating a High Court for Southern Rhodesia vested in it a similar rule-making power, somewhat more briefly expressed.[3] In 1902 an Ordinance in the Orange River Colony[4] and a Proclamation in the Transvaal,[5] establishing High Courts in the two Colonies, bestowed upon them wide rule-making powers in the identical terms of the old Cape Charter, omitting only the concluding clause which refers to the Courts at Westminster.[6]

When the Union was created in 1909[7] the Supreme Courts of the several Colonies were made Divisions of the Supreme Court of South Africa, and a power was vested in "the Chief Justice of South Africa and the ordinary judges of appeal"[8] to make rules for the conduct of all proceedings in the

[1] Cape of Good Hope Colony Better Administration of Justice Act, No. 35 of 1896, s. 56. Over 400 Rules have been issued, from time to time.

[2] Act No. 39 of 1896, s. 69. In 1907 there were issued forty-four Orders, with Forms, drawn partly from the English Rules.

[3] Order-in-Council, October 20, 1898, Part IV. s. 57.

[4] Orange River Ordinance No. 4 of 1902, ss. 43-4. In the *Government Gazette* for July 23, 1902, were published 156 Rules.

[5] Transvaal Proclamation No. 14 of 1902, ss. 31-2. Also s. 10 of Ordinance No. 10 of 1903, regulating assizes.

[6] Rules in the Transvaal have been published in Government Notices Nos. 153 and 204 of 1902; 501, 1093, and 1376 of 1903; 678 of 1905; 882 and 1266 of 1906; 640 and 698 of 1908—about 160 Rules in all.

[7] South Africa Act, 1909, 9 Ed. VII. c. 9.

[8] S. 107. For Rules under this section see Government Notices Nos. 61, 326, and 561 of 1910.

Appellate Division of the consolidated Court. The Chief Justice was also empowered to join with the other judges of the Supreme Court in making Rules for the several provincial and local divisions.[1]

India.—Apart from the self-governing dominions India is the largest unit for which the English rule-making system has been directly copied. The judicial establishments of the Indian Empire, though most varied, may be said to centre in six High Courts, four of them set up by Imperial charter under the Indian High Courts Act, 1861,[2] and two by subsequent action under local governmental powers. The first four are situate at Calcutta, Madras, Bombay, and Allahabad; the last two at Lahore and Rangoon. For many years civil proceedings in these Courts, and in all the inferior Courts within their appellate jurisdiction, were regulated by an Indian Code of Civil Procedure, one of the notable series of code statutes which made Indian legislation the joy of law reformers.[3] There was, however, in spite of the Code, whose clauses were not subject to alteration except by statute, a power given to the judges by s. 15 of the High Courts Act to make all such rules and regulations as were necessary to supplement the Code. This was to enable them to accommodate the fixed Code to the widely varying local conditions in which it had to be administered, and the power was freely used.

In 1908 the character of the Civil Procedure Code was completely altered.[4] A conviction that statutory regulation of civil procedure is too rigid, and that the time had come to extend to Indian Courts the greater autonomy gradually being bestowed on the other departments of government, contributed to causing a great change in its form. The new Code is, like the English Judicature Acts, very little more than a code of court organisation, to which is appended a long Schedule of Rules and Forms which embody the substance of the procedural regulations,[5] and each High Court is empowered to make Rules of Court altering the Rules in the Schedule, after taking into consideration the advice of a Rule Committee created by the Act.

The operation of the rule-making system is so carefully worked out that the sections on the subject are worth quoting:

> S. 122: High Courts . . . may, from time to time after previous publication, make Rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such Rules alter, annul, or add to all or any of the Rules in the First Schedule.

[1] S. 108. For Rules under this section see Government Notice No. 447 of 1911.

[2] 24 & 25 Vict. c. 104.

[3] The first Code was Act VIII. of 1859; that was supplanted by Act X. of 1877, and that in turn by Act XIV. of 1882.

[4] Act V. of 1908.

[5] An authoritative annotated edition of the Act and Rules is Woodroffe and Ameer Ali, *Code of Civil Procedure* (Calcutta, 1908). A more recent one is D. F. Mulla, *Code of Civil Procedure* (Bombay, 1913). The Schedule of Rules contains fifty Orders. There is a separate Schedule of Rules for Arbitrations.

All the inferior Courts from which appeals lie to each High Court are the "Courts subject to their superintendence." The High Court is charged in the Act with the duty to exercise a general supervision over their conduct and administration :

S. 123: (1) A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore, and Rangoon.

(2) Each such Committee shall consist of the following persons, namely :

(*a*) Three judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years;

(*b*) a barrister practising in that Court;

(*c*) an advocate (not being a barrister) or vakil or pleader enrolled in that Court;

(*d*) a Judge of a Civil Court subordinate to the High Court; and

(*e*) in the towns of Calcutta, Madras, and Bombay, an attorney.[1]

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president.

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other judges to be appointed shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.[2]

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies, or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge, and shall receive such remuneration as shall be provided in this behalf by the Governor-General in Council, or by the local Government, as the case may be.

Each Rule Committee, therefore, of six or seven members and a secretary, represents the collective experience of both judges and practitioners. Of the four judges in each Committee at least two must have sat in the lower Courts, which is important, as the High Court can make rules for them. The officer who acts as secretary to a Rule Committee is usually the Registrar of the High Court; no extra salary has yet been attached to the appointment. This arrangement seems to remedy the defect claimed to exist in the English Rule Committee's organisation, by reason of the fact that no Master of the Supreme Court has a voice in its councils.

S. 124: Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter, or add to the Rules in the First Schedule or to make new Rules, and before making any Rules under s. 122 the High Court shall take such report into consideration.

[1] The judges in the lower Courts are called District Judges. Vakil and pleader are synonymous terms; see an article by C. E. A. Bedwell, Esq., in 13 *Journal of the Society of Comparative Legislation*, 130 (1914), for the qualifications required of them.

[2] None of the Chief Justices or Chief Judges has, so far, chosen to appoint himself to the Rule Committee.

Unlike the English body, the Indian Rule Committees are not themselves the authority to whom the quasi-legislative rule-making function has been delegated by the legislature. They act merely in an advisory capacity; they can recommend to their respective High Courts the adoption of an amendment, or they can advise against it; but their conclusions are not binding upon the High Courts. To a certain extent the views of a Committee would coincide with those of its Court, as the opinions of the four judicial members would outweigh those of the practitioner members in the Committee; but the judges might themselves be a minority in the High Court, there being nineteen judges in Calcutta, twelve in Madras, seven in Bombay, and seven in Allahabad.

But the High Courts are not entirely unfettered in the power to make rules, for by

S. 126: Rules made under the foregoing provisions shall be subject to the previous sanction of the following authorities, namely:

(*a*) If the rule is made by a High Court established under the Indian High Courts Act, 1861, to the sanction of the authority prescribed by s. 15 of that Act for rules made under that section;

(*b*) if the rule is made by any other High Court, to the sanction of the local Government.

This amounts to a requirement that each High Court must have the approval of the Governor in Council of the Province in which it is situate, for Rules made. This approval is not by any means a purely formal matter, and is not forthcoming unless the Executive is satisfied the High Court is not going too far.

S. 127: Rules so made and sanctioned shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the High Court which made them, as if they had been contained in the First Schedule

This is merely a condition subsequent. By a short phrase in s. 122 the Act seems to require also a prior publication, similar to that called for by the English Rules Publication Act, 1893. The section says that a High Court may make Rules "from time to time *after previous publication*." No explicit directions are given elsewhere for the manner or time of such "previous publication," but the obvious intention of the words is that due notice should be given of the intention to issue Rules, by publishing their draft form before they are finally signed.

The machinery set up by ss. 122-7 is, perhaps because of its novelty to the Indian judges, only just beginning to be used. Only a few alterations in the Schedule of Rules have so far been affected.[1] Not all the High Courts

[1] The amendments made up to 1913 are collected in an Appendix to Mulla, pp. 988-1022.

have availed themselves of it, and up to the present the Calcutta High Court has not yet even appointed its Rule Committee under the Act. There is still in force a very considerable body of Rules in all the High Courts, made under s. 15 of the Act of 1861 and expressly ratified by the 1908 Code:

> S. 129: Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, may make such Rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such Rules in force at the commencement of this Code.

These Rules are collected and published from time to time by the High Courts from which they issue, and provide regulations for the numerous details of local application left untouched by both the old statutory Code of Civil Procedure and the present Schedule of Rules. The Calcutta Rules appear in three volumes, containing the regulations for the Original Side,[1] the Appellate Side,[2] and Inferior Courts,[3] respectively. The Bombay Rules are in two volumes: General Rules, and Rules for the Appellate Side.[4] The Madras Rules are in two volumes: Original Side[5] and Appellate Side.[6] The Allahabad Rules are in one volume of General Rules.[7]

The Far East.—British colonial Courts all over the Far East, working under conditions similar to those prevailing in India, are in the habit of looking to the Indian Courts for suggestions for possible improvements. In fact, in a few of the colonies the entire Indian Code of Civil Procedure is by reference incorporated into the local law. Changes in Indian procedure are therefore observed with interest in all these places, and often reflected in their Courts.

Ceylon is an example. The largest of the Crown Colonies, its judgeships are the highest appointments in the colonial judicial service. Although its substantive law is Roman-Dutch, like that of South Africa, its civil procedure was, until this year, expressed in a statutory unchangeable code based partly on the Indian Code of 1882 and partly on the New York Code.[8] The local legislators, however, being now satisfied that procedure should be left to the judges, a new code has been drafted in the form of the new Indian Code of 1908 and is about to pass.[9] It throws into a schedule all the Rules of Procedure, the draft being based on the new Indian Rules and on the present English R.S.C., and confers the power to alter Rules upon a Committee in

[1] Collected by J. H. Hechle, and published Calcutta, 1914.
[2] Watson's Collection, Calcutta, 1910. [3] Calcutta, 1910.
[4] Bombay, Government Central Press, 1909.
[5] Madras, Scottish Press, 1887. [6] Madras, Scottish Press, 1905.
[7] Allahabad, United Provinces Government Press, 1911.
[8] Ordinance No. 2 of 1889. It is a statute in sixty-seven chapters, containing 838 sections.
[9] December 1914. The 1889 Code is therefore omitted from the 1913 Revised Statutes of Ceylon.

which the Supreme Court, the lower Courts, and the practitioners are all represented.

After Ceylon, Hongkong has the busiest of the Far Eastern Courts. There too the influence of the Indian Codes is marked, although the actual rule-making authority has not been conferred upon the judges. The present Code of Civil Procedure is a statute in thirty chapters, containing 709 sections and fifty Forms.[1] It was drafted by the Chief Justice, Sir John W. Carrington, who, in the preface to his edition of the Code,[2] explains that some use was made of the 1882 Indian Code of Civil Procedure, and that a great quantity of new matter was taken from the English R.S.C. The rest was drawn from the older Hongkong Code of 1873. That was a statute in twenty chapters drafted by Mr. Julian (later Lord) Pauncefote, then the Attorney-General for Hongkong, which was based partly on the Indian Code of 1859, partly on the Rules of the High Court of Bengal and Calcutta, and partly on the Report of the English Judicature Commission of 1869. It has the distinction of having combined the procedure in law and equity in a British possession two years before the English Judicature Act itself went into effect.

Straits Settlements has also a statutory Code which copies many sections of the Indian Code and of the English R.S.C.[3]; but in other parts of the Malay Peninsula the procedure is regulated by Rules of Court issued by the local Judicial Commissioners.[4] The Chief Justice of the Straits Settlements has recently been empowered to prescribe Rules of Court for proceedings in Labuan.[5]

East Africa.—In Zanzibar the Court has, since 1908,[6] had the power to prescribe all Rules for proceedings, and under this power 200 Rules drawn from the current English R.S.C. and from the new Indian Rules were issued by the Judge in 1911. In East Africa[7] and in Uganda[8] the Indian Code is, by local Ordinances, adopted in its entirety. An Order-in-Council extends the Indian Civil Procedure Code also to Somaliland[9] and allows the Protectorate Court to supplement it by rules necessary for local purposes.[10] The British Central Africa Order, however,[11] makes the English procedure the model for the Court and gives the High Court complete power to regulate procedure. The High Court Act for the Nyasaland Protectorate[12] is a combination of statutory and non-statutory regulation of procedure; it contains a little over

[1] Ordinance No. 3 of 1901. [2] Hongkong, 1901.

[3] Straits Settlements Ordinance 31 of 1907, a statute in sixty-one chapters, containing 1,343 sections.

[4] Selangor, Perak, and Penang: Enactment 15 of 1905, s. 67. Rules are made by the Judicial Commissioners, or any two of them, of whom the Chief Judicial Commissioner must be one.

[5] Straits Settlements Ordinance 3 of 1911, s. 47.

[6] The Courts Decree, No. 8 of 1908, s. 40. [7] Ordinance No. 13 of 1907.

[8] The Courts Ordinance, No. 12 of 1911, s. 2.

[9] Somaliland O.-in-C. 1899, s. 23. [10] S. 31.

[11] British Central Africa O.-in-C. 1902, s. 22.

[12] High Court Practice and Procedure Act, No. 3 of 1906.

200 sections of procedural matter and enacts that as to any gaps left they are to be filled by applying the English R.S.C. as amended from time to time.[1]

Mauritius is a colony in which, in spite of the influence of a foreign procedural system, the English Rules have been very largely copied. There a French Code of Civil Procedure was in force until 1903, when the judges, under general powers conferred upon them in the Courts Ordinance,[2] issued an entirely new set of 199 Rules, based on the English R.S.C.[3]

The Pacific.—Procedure in the Colonies in the Pacific is wholly subject to Rules of Court. In British New Guinea (Papua) the practice and procedure of the Courts of Queensland were adopted *in toto* by the Ordinance of 1888,[4] which also gave the Chief Magistrate the power to alter and make new Rules of Court. Under this power he issued a set of 132 "Rules of Civil Procedure" in the following year. His rule-making power extends also to criminal procedure. In Fiji the Supreme Court Act of 1875[5] followed closely upon the English Judicature Act, and under the rule-making power it granted to the Chief Justice[6] a full set of Rules was issued in 1894. The Pacific Islands, under the Pacific High Commissioner, are provided with a judicial system in the Order-in-Council of 1893[7] which gives the High Commissioner the power to make Rules of Court.[8] A schedule of 82 Rules and 33 Forms is appended to the Order. The Brunei Order-in-Council[9] gives the Court the power to prescribe all Rules for proceedings. At Wei-hai-wei, likewise, there is a Court set up by Order-in-Council[10] which has the power to make all necessary Rules, and from which appeals lie to the Court at Hongkong, subject to Rules made by the latter.

Mediterranean.—Ottoman law is the basis of the procedure in a number of protectorates and other areas where British officers are empowered to exercise foreign jurisdiction. The Orders-in-Council providing Courts for such territory are grouped under the heading "Foreign Jurisdiction" in the collected Statutory Rules and Orders, and they uniformly appoint the rule-making power to the local judicial officer. The most prominent of these is Cyprus, now recently raised in law as well as in fact to the state of a British possession.[11]

At the other end of the Mediterranean, in Gibraltar, under the Order-in-

[1] S. 2. [2] And the Royal Order-in-Council of February 23, 1836.

[3] See Piggott's *Laws*, Rev. 1905, vol. vi. Foreign procedural codes are still in force in Seychelles (French) and in Malta (Italian).

[4] S. 9. [5] No. 7 of 1875.

[6] S. 27. The 1894 Rules supplant the earlier Rules of 1875, which were largely copied from the English Schedule, but arranged similarly to the Leeward Islands Civil Procedure Code. In 1890 a set of 231 Bankruptcy Rules, with 69 Forms, was published.

[7] S.R.O. 1903, v. 484. [8] Ss. 101-7.

[9] Brunei Order-in-Council, 1901, s. 91.

[10] Wei-hai-wei Order-in-Council, 1901, s. 79.

[11] Cyprus Order-in-Council, 1882, s. 209. Under this were issued the Rules of 1886, in 31 Orders. They are not based on the English Rules. Frequent amendments are made by the High Commissioner and the Chief Justice.

Council of 1888,[1] the Court is organised on the modern judicature principle, the Chief Justice having the power to make all Rules. There is an interesting direction to him to guide the exercise of his rule-making authority[2]:

> All Rules shall be framed to promote, so far as may be, economy and expedition in the despatch of the business of the Supreme Court; and all such Rules and Forms of practice, process, and proceeding shall, so far as the circumstances of Gibraltar may permit, be framed with reference to the corresponding Rules and Forms in use in the High Court of Justice in England.

West Africa.—In the Colonies down the West African Coast very similar arrangements prevail. In the Gambia the Chief Magistrate may at any time make Rules of Court for all purposes,[3] and in 1911 a set of 65 Orders drawn from the English R.S.C. was issued. In Sierra Leone it is the Chief Justice who has the power,[4] and in 1908 a set of 65 Orders was issued thereunder. In the Gold Coast the Chief Justice, with the concurrence of any one of the four puisne judges, may make Rules,[5] and to the Ordinance creating the Supreme Court is appended a Schedule of Rules and Forms, divided into 53 Orders on the English plan. Similar Ordinances, with Schedules of Rules, and allowing the Chief Justice to make or alter Rules, were passed in Southern Nigeria in 1900,[6] and in Northern Nigeria in 1902.[7]

West Indies.—Across the Atlantic the West Indies have paid the Judicature Acts the compliment of widespread adoption. In two cases the form taken by the local Ordinances is of especial interest—it is that of a code statutory in character but liable to alteration by Rule of Court. In one of these cases the liability to such alteration was introduced many years after the Code itself. In Grenada the Civil Procedure Code of 1882[8] is in 9 Parts, containing 419 Rules and 53 Forms, based on the English Schedule of 1875; the concluding section[9] authorises the Chief Justice to make Rules for regulating the Court's procedure, which Rules "may alter or repeal any of the provisions of this Ordinance." This differs from the English form of Judicature Act, in which the parts subject to alteration are thrown into a schedule separate from the body of the Act. In Jamaica the Civil Procedure Code of 1879,[10] based on the English Schedule of 1875, was replaced in 1889[11] by a Code based on the English R.S.C. 1883, divided into 52 titles and containing 676 sections, with 70 pages of Forms. This Code was originally an unalterable statute, and there was a provision in the Judicature

[1] Laws, 1913, vol. i.

[2] S. 23: Under this were issued in 1889 three series of Rules: 544 General and Probate Rules (copied from the English R.S.C.), 111 Rules for Divorce Causes, and 254 Rules for Summary Jurisdiction (based on the English County Court Rules, 1886).

[3] Ordinance 3 of 1908, s. 2. [4] Ordinance 14 of 1904, s. 21.

[5] Ordinance 4 of 1876, s. 81.

[6] Ordinance 6 of 1900, s. 119, as amended by Ordinance 28 of 1912. A Schedule of 61 Orders and 125 Forms.

[7] Proclamation 6 of 1902, s. 58. A Schedule of 57 Orders and 33 Forms.

[8] C. 172 of Revised Laws. [9] S. 419.

[10] Law 39 of 1879. [11] Law 40 of 1888.

Law, 1879,[1] that the Chief Justice, with the concurrence of the puisne judge, might make Rules for any procedural matter not expressly covered by the Code. But in 1902 that power was expressly extended to include the right to make Rules "for the purpose of revoking or amending all or any of the provisions of the Civil Procedure Code, 1888, . . . anything in the Civil Procedure Code aforesaid notwithstanding."[2] A large number of revocations, alterations, and additions have been gazetted under this wider power, which furnishes the only instance of a procedural statute subsequently reduced to the status of Rules without having been repealed.[3] Appeals from British Honduras lie to the Supreme Court of Jamaica, although there is a separate Supreme Court in Honduras for which its Chief Justice, by himself or with the concurrence of the puisne judges, is empowered to make Rules of procedure.[4]

Besides Grenada the other three of the Windward Islands have codes of procedure drawn very largely from the English Rules, but two of them are statutes not subject to alteration by Rules. In Barbados there is still a separate Court of Chancery and Court of Common Pleas—one of the few remaining in all the British possessions—but the latest Common Pleas Act is a code in 27 Parts, containing 266 sections drawn principally from the English R.S.C.[5] The Code of Civil Procedure of St. Lucia, enacted in 1881, is in 1087 sections, a combination of the English Schedule of 1875 with the French Code.[6] But in St. Vincent the Supreme Court of Judicature Ordinance, 1880, leaves the framing of Rules for procedure entirely to the Chief Justice.[7] A Court of Appeal of the Windward Islands, made up of the four Chief Justices, hears appeals from the four Supreme Courts, according to Rules prescribed by it.

The Leeward Islands Supreme Court Consolidation Act, 1911, is an illustration of a very simple device for obtaining a procedural code with the minimum of difficulty. It enacts that[8]:

> All the jurisdiction, powers, and authorities whatsoever possessed by, and vested in, the Supreme Court of the Leeward Islands shall in civil proceedings be

[1] Law 24 of 1879, s. 36. [2] Law 22 of 1902, s. 1.

[3] A collection of Rules made by the Supreme Court under both powers was published at Kingston in 1909, in 148 quarto pages.

[4] Supreme Court Ordinance, c. IX. of Revised Statutes, 1914, s. 60. Under this, 121 Rules in 1888. These Rules, however, are merely supplementary to the Code of Civil Procedure, c. X. of Revised Statutes, 1914, a statute of 339 sections copied from the English R.S.C.

[5] No. 6 of 1911. But under the Court of Chancery Act (No. 51 of 1891, s. 9) chancery practice is subject to rules. The present Rules are contained in 17 Orders of 1903, largely copied from the English R.S.C.

[6] See Royal Courts Ordinances, No. 13 and No. 29 of 1888.

[7] No. 14 of 1880, s. 68. A Code of Civil Procedure was passed a few years later (No. 2 of 1884) but it is expressly (s. 375) subject to the rule-making power bestowed in 1880. In 1887 a set of 113 Rules was issued, some of which amend the Rules in the Code

[8] No. 8 of 1911, s. 52.

exercised in conformity with the practice and procedure for the time being in force in England, which said practice and procedure, together with any law for the time being in force in England, authorising or regulating the same, shall be deemed to be hereby extended *mutatis mutandis* to this Colony.

This is made subject to a power in the Chief Justice, with the concurrence of the puisne judge, to make Rules "limiting or excepting the operation of the said law, practice, and procedure." The only other instance of such complete incorporation by reference is the adoption of the Indian Code in the East African Colonies.

All the other Crown Colonies in the New World have handed over to their Chief Justices, either alone or with the concurrence of puisne judges, the power to make Rules. The only one of their statutes worthy of especial note is the Bahama Islands Act, in which the section on rule-making is worded with comprehensive brevity [1]:

It shall be lawful for the Chief Justice for the time being from time to time to frame General Rules and Orders for regulating in the simplest possible manner the conduct of all civil and criminal business and the pleading, practice, and procedure in all matters both original and appellate in the Supreme Court coming within its cognisance in its various jurisdictions and on its several sides.

Powers of similar scope were bestowed in Trinidad and Tobago in 1902,[2] in Bermuda in 1905,[3] in British Guiana in 1893,[4] and in the Falkland Islands in 1901.[5]

In every case the power of the judges to make Rules is subject either to prior approval by the local executive, or to subsequent revocation of the Rules by the local legislature.

The great reforms of the Judicature Acts were not in substantive but in procedural law, and the Rule Committee is the personification of the new spirit in English Courts of civil jurisdiction. The rule-making powers now reposed in the Courts have laid for ever the ghost of technicality; procedure is now no longer a game or mystery, and throughout the Empire "reality has been given to the legal rights of individuals."[6]

[1] Supreme Court Act, 1896, 59 Vict. c. 26, s. 52. Under this there were issued in 1899 a set of 584 General Rules, drawn from the English R.S.C., 71 Rules for the Summary Side in 1908, and 33 Rules for the Probate Side in 1908.

[2] Judicature Ordinance, Revised Laws 1902, No. 34, s. 46. The General Rules were issued in 1898, in 74 Orders, many copied from the English R.S.C., with Forms.

[3] Supreme Court Act, No. 4 of 1905, s. 22. In the same year were issued the Rules, n 71 Orders, nearly all from the English R.S.C.

[4] Supreme Court Ordinance, No. 7 of 1893, s. 58. Under this, the Rules of 1900, in 53 Orders, largely drawn from the English R.S.C.

[5] Supreme Court Ordinance, No. 4 of 1901, s. 34.

[6] To use the phrase of Professor Dicey (*Law and Public Opinion*).

SOME NOTES ON AIR-WARFARE.

[*Contributed by* C. M. Picciotto, Esq.]

The Application of International Law to Aircraft.—The purpose of this article is to examine some incidents of air-warfare of recent occurrence in the light of such rules of International Law, if any, as are relevant. It will at once be apparent that there is grave risk of the fallacy of the vicious circle. For since International Law rests upon the practice of States who are subject to that Law, such practice being expressed either by convention or by state-action, it is obvious that the military and naval use of aircraft by the belligerents in the present struggle has not yet afforded instances of practice sufficiently numerous or sufficiently consistent to form the basis of any rules of law. Each incident must receive due weight as a factor. Nor are we assisted by any written law; for the Hague Conventions, in so far as they bear upon the subject at all, are, it seems, of no binding value,[1] since some of the belligerents have failed to ratify them. Such a failure produces a two-fold effect—the discharge from the obligation of observance of the non-ratifying power, and also the discharge of all other powers engaged in the same war. The matter is therefore *res integra*. We have neither custom nor convention to guide us, and can therefore hope only to indicate the growth or inchoation of a custom, or a tendency towards it. The importance of practice has been thus emphasised because much that has been written upon the "law" of the air seems to rest on an insufficient apprehension of the true basis of International Law. *A priori* theorising and the reckless use of analogy are of little assistance in arriving at a true statement of the law; while the attempts at a codification, such as those of M. Fauchille[2] and Mr. Spaight,[3] ingenious as they are, aim rather at symmetry and completion than at a deduction and generalisation from practice. Of International Law is it pre-eminently true that the work of the lawyer begins when that of the inventor and the scientist ends. It is their co-ordination and establishment of facts that provides the lawyer with the foundation upon which he builds. Hence it is idle in the present stage of the development of aviation to draw distinctions between public and private air-vessels, or to frame elaborate rules for the carriage of contraband or the breaking of blockade in the air. In fact there is no such thing as a mercantile marine of the air, there is no highway

[1] 4 H.C. (1907) Art. 2.
[2] *Annuaire de l'Institut*, 1911.
[3] Spaight, *Aircraft in War*, p. 114.

of traffic of the air, and above all, it is most doubtful at present whether the exigencies of commerce or the development of aviation will render it necessary or practicable that there ever should be. Any such extension by analogy of the rules of maritime law is an improper exercise of analogy, of which the true function in law is to bring within the same principle two or more *similar* groups of facts. If the facts are not similar, the syllogism (for the rules of law are a collection of syllogisms) errs in its minor premiss.

Sovereignty of the Air.—Any discussion upon the use of air-vessels in war resolves itself into three branches: where may they be permitted to operate, what violence may they be permitted to offer, and against what may that violence be directed?

The question of sovereignty of the air is of prime importance, for closely related to it is that of the Region of War. The Region of War [1] is all that space in and over which the armed energy of the belligerents may lawfully operate without a violation of neutrality, whether that neutrality be the creation of the common law of nations or of treaty. Therefore, if the air-space above the territory of a sovereign state is subject to its sovereignty and jurisdiction, any hostile operation of an air-vessel in that space is a violation of its neutrality. It now remains to examine the practice, with a view to ascertaining whether there is sufficient upon which to ground a rule of law. Nowhere more than in this direction has the fallaciousness of analogy been exhibited. A hasty assimilation for all purposes of passage through the air to passage over the sea has led to such suggestions [2] as that of the three-mile limit, above which should extend the Open or High Air. Such assimilation is inaccurate, because the conditions are not the same.

Proposed Rules of the Institute of International Law.—The Institute of International Law at its session of 1911 laid down the following rule: "International aerial circulation is free, subject to the right of the underlying state to take certain steps which should be fixed to safeguard their own security and that of the persons and property of their inhabitants." [3] This would render free the air-space above state-territory, subject to a limited jurisdiction being exercised by the subjacent authority in the interests of self-preservation. The extent in air of their jurisdiction is not defined.

Proposed Rules of International Law Association.—The International Law Association proposed that the subjacent state should exercise sovereignty over its air-space *usque ad cælum*, subject to a right of free passage.[4]

These expressions of opinion, being the crystallisation of the thought and labour of jurists of eminence, are entitled to the greatest respect. But such respect must stop short of their recognition as rules of law. They are not law, however inspiring and formative they may be.

Resolutions of Fédération Internationale Aéronautique.—At a meeting of

[1] See 2 Oppenheim, *Int. Law*, 85, 86.
[2] See the authorities collected in Lyclania, *Air Sovereignty*, pp. 11–14.
[3] *Annuaire*, 1911.
[4] Report of Madrid Conference, 1913.

this body held in Paris in May 1914, the President declared that "les interdictions des zones sont d'une autre époque." The general tendency of the speakers seems to have been in favour of the freedom of the air. (See Clunet, third number of 1914.)

The Recent Practice.—Such practice as there is points, on the whole, in one direction—the sovereignty of the air exercised by the subjacent State. The British Aerial Navigation Act of 1913 gives the Government power to prohibit the navigation of aircraft over "the whole or any part of the coast line of the United Kingdom, and the territorial waters adjacent thereto."[1] Legislation of about the same time in France and Russia rests upon the assumption of a sovereignty of the air vested in the subjacent state, as also does a Franco-German Convention concluded in 1913.[2]

On August 3, 1914, at 6.45 in the evening, Baron von Schoen, German Ambassador in Paris, called upon M. Viviani to demand his passports. In the note which the Ambassador handed in occurs the following sentence:—"Several of these [French military airmen] have manifestly violated the neutrality of Belgium by flying over the territory of that country."[3] It is not necessary to enter into the merits of the question, whether such an act could rightly be regarded as a breach of neutrality as against the German Empire before the outbreak of war with France; the importance of the above quotation lies in the fact that the pretension could have been advanced. But the point assumed a more practical interest as a result of the British air-attack on the Zeppelin sheds at Friedrichshaven on November 21, 1914. The Swiss Government, in a note to the British Foreign Office, protested against the violation of their neutrality involved in the alleged flight of British aeroplanes over Swiss territory. The British Government in its reply apologised for the incident, and stated that in fact instructions had been issued to avoid flight over neutral territory. But it continued: "Such expressions of regret for the non-observance of its instructions are not to be interpreted as a recognition by the British Government of the existence of a sovereignty of the air."[4]

These instances of practice go to show the growth of a custom of regarding the subjacent state as exercising a sovereignty of all the air above it, subject to the reservation that no valid custom could arise which did not include the assent of so important and enterprising an Air Power as Great Britain. Still less, of course, can it be said that the practice, such as it is, has resulted in Law. Further, in so far as these instances indicate that the air is subject to territorial sovereignty, it would seem that the air above the high seas is free.

Bombardment by Aircraft.—The manner of violence which aircraft may employ, and the object of that violence, is regulated by the general law of

[1] See Spaight, *Aircraft in War*, 59-61.
[2] Report of Madrid Conference, 1913, pp. 542-5.
[3] *French Yellow Book*, No. 147. [4] *Times*, December 8, 1914, p. 7.

bombardment, from whatever device that bombardment be directed. The attempts made at The Hague in 1899 and 1907 to prohibit absolutely the dropping of bombs from aircraft seem strangely remote in their utter failure, in view of the great activity in this arm of warfare that has been recently revealed.

The Fourth Hague Convention of 1907 (Art. 25) lays it down that: "The attack or bombardment by any means whatever of towns, villages, habitations or buildings which are not defended is forbidden."

The Ninth Hague Convention of 1907, which deals with bombardment by naval forces, repeats the prohibition just quoted, without the words "by any means whatever." But military works, military or naval establishments, depôts of arms or war material, etc., and men of war in the harbour of undefended places, may be bombarded, under certain circumstances.

But it cannot be sufficiently emphasised that the Hague Conventions are in strictness not law, because they have not been ratified by all the belligerents (*i.e.* Turkey, Servia, and Montenegro) engaged in the war.[1] In order, therefore, to arrive at a clear rule we must fall back upon the general practice which exists independently of the Conventions, but of which they may be regarded as some evidence. It is not possible, upon a true view of the basis of International Law, to put their value higher than this. It is submitted, then, that the rule of law permits of the dropping of bombs from aircraft upon defended and on fortified places, and (according to the British War Manual) upon the undefended parts of fortified places, and upon any point of military, strategic, or economic importance. The two conditions of the defendedness of the place and its military importance must coexist. A place which is technically a defended place, *e.g.*, by reason of the presence of mines off the coast, is not subject to bombardment from the air save in pursuit of some military object. Where the bombardment is directed upon any point such as an arsenal or depôt, that is in itself a sufficient object to make the bombardment legitimate. Every attack from aircraft must follow the general rule of law which places upon military forces the obligation of using all reasonable care and skill to avoid injury to non-combatants.

These submissions have, on the whole, been borne out by the practice in this war. The attacks on Antwerp, Nancy, Warsaw, Cuxhaven, and Great Yarmouth are of the normal type; while those upon the Zeppelin sheds at Friedrichshaven, upon the submarine bases at Zeebrugge, and on railway stations such as those of Ostend and Metz, present interesting examples of the selection for attack of points where valuable material is collected. The bombardment of King's Lynn neither comes under this last head, nor could be said to serve any military object, and is therefore indefensible.

Analogies between Aerial and Naval and Military Warfare.—Some attempt will now be made to bring certain of the facts of air-warfare within the principles that cover similar facts when they occur in the warfare of other

[1] This is expressly stipulated by the Conventions themselves.

arms. It has been already pointed out that there is no special law governing the dropping of bombs from air-vessels, but that it was subject to the general rules of bombardment. In the same way there is no special law governing the recognition of air-vessels as a part of the public armed forces of the enemy, and the status of their crews as lawful combatants. Indeed, in the present state of the development of aviation such speculations are idle, since, in the absence of private venture in the air, whether for a military or commercial purpose, all air-vessels may be taken to be public armed vessels and their crews to be lawful combatants.

No Piracy of the Air.—On the occasion of the bombardment of Libau by German aviators, the *Times* of Tuesday, February 1, 1915, contained an announcement that the Russian Government intended to treat the crews of the guilty air-vessels as "pirates," since they had committed the offence of attacking an undefended town. If the announcement be correct, it is perhaps unfortunate that the analogies of the sea should be so freely resorted to. Piracy is in its pith an essence of the sea. That is the gist of the offence. There is no piracy of the air in the present state of the law. Upon the assumption that Libau is an undefended town, there was a clear breach of the rules of warfare. Prof. Oppenheim includes such an attack as this in his list of war-crimes,[1] for which the punishment on capture by the enemy may be death. This seems the correct view, and on this showing the crews of such air-vessels would be war-criminals, but not pirates.

Sale of Airships to Belligerents.—The sale during or in contemplation of war of a warship by a neutral to one of the belligerents, may amount to an "illegal expedition" against the other belligerent based upon the territory of that neutral. If not, then the warship is an article of contraband, liable to capture, though its despatch involves no breach of neutrality. The second view used to be held, and a distinction was drawn between ships which were sent direct to a belligerent on his order and those which were sent in search of a market. At the present day any such despatch of a vessel is probably a breach of neutrality. Is the despatch of an air-vessel also an unneutral act? At the beginning of the Turco-Italian War the French Government was approached by Italy with a view to preventing the export of aeroplanes for the use of the Turkish forces.[2] M. Poincaré explained the French reply in the Chamber of Deputies, holding that no distinction could be drawn between aircraft and other munitions of war, which were liable to capture as contraband, but involved the despatching state in no breach of neutrality. By Order-in-Council of August 4, 1914, the British Government placed aeroplanes, aircraft of all kinds, and component parts thereof, on the list of absolute contraband.

Transfer of Airships to Neutral Flag.—In the absence of a mercantile marine of the air liable to capture, if such be possible, by armed air-vessels

[1] See 2 Opp., *Int. Law*, p. 311. [2] See Spaight, *Aircraft in War*, 90.

of the enemy, the question of the legality of transfer to a neutral flag after or in contemplation of war does not arise. It is impossible to say whether rules governing such a situation will ever become necessary or not. If and when the facts arise, rules of law will doubtless be evolved. Necessity is the parent of law.

Internment of Aviators.—Apart from the provisions of the Tenth Hague Convention of 1907,[1] the law is not clear as to what should be done with shipwrecked sailors of one belligerent picked up by warships or merchantmen of a neutral. The broad rule would seem to be that if they are rescued by a neutral warship, or if they come upon neutral territory, they should be prevented from taking any further part in the war. If, on the other hand, the rescue is effected by a merchant vessel, they may be allowed to return to their home state, though they must be surrendered if demanded by an enemy warship.

The analogy of shipwreck may properly be extended to the case of air-vessels, as has in fact been done in the following instances:

After the British air attack on Bruges, a British officer and a mechanic were rescued off Flushing by the Dutch trawler *Oranje Nassau*, and sent back to England.

Flight-Commander Hewlett was picked up by a Dutch trawler after his flight to Cuxhaven, and sent back to England.

On the other hand, the crew of a Zeppelin which descended in flames on the Danish island of Fanö was properly interned.

The *Times* of March 25, 1915, contains an official statement issued by the Admiralty reporting an attack by British aircraft of the German submarine works at Hoboken. "Flight-Lieutenant B. Crossley-Meates," we are told, "was obliged by engine trouble to descend in Holland." A message from Amsterdam in the same issue confirms the descent, and states that the airman is to be interned.

Aerial Reconnaissance not Espionage.—The practice of the present war seems to have been in accord with the principle laid down in the Fourth Hague Convention of 1907, in which it is in terms declared that persons engaged in reconnaissance by balloon shall not be deemed to be spies. The use of air-craft upon a large scale for the purposes of military reconnaissance and for giving the range of artillery fire has shown that airmen so engaged are conducting a lawful military operation; and on the occasions on which they have been brought down into the enemy's lines they have been treated as prisoners of war, and not as spies.

Thus we can discern the growth of a custom in many of the aspects of air-warfare; and doubtless in due time the practice exhibited above will form the basis for a true and final statement of law.

[1] Higgins, *Hague Peace Conferences*, p. 258.

THE CASE OF THE "NIEUWE VRIENDSCHAP."[1]

[*Contributed by* J. E. G. DE MONTMORENCY, ESQ., M.A., LL.B.]

THE problem as to the transference of merchant ships from belligerents to neutrals was first argued fully in the English Courts during the Anglo-Dutch War of 1783 in the unreported case of the *Nieuwe Vriendschap*. This case and an earlier one, that of the *Felicity* (1756), are referred to in a note to the case of the *Minerva* (1807, 6 C. Rob. at p. 399). This note of the case runs as follows:

> The *Nieuwe Vriendschap*, Knuttel [Lords, March 7, 1786], and other *Dutch* ships, had been lying with their cargoes on board, at *Curaçoa*, near two years in expectation of convoy, and were asserted to have been sold in that situation to Imperial subjects, and other neutral claimants.
>
> From a note of the *Nieuwe Vriendschap*, which seems to have been the first of that class of cases, it appears that the point of law was strongly argued. On the part of the claimant some precedents were cited, especially the *Felicity* in 1756, a *French* ship which had sailed from *Martinico*, and had put into *Cadiz*, and was there sold, and was afterwards taken and condemned, as not proved to be *Spanish* property. But that judgment was reversed in the Court of Appeal. In the *Nieuwe Vriendschap* the Court of Appeal seems to have inclined rather to the argument of the claimant, but did not give any decision, upon the question of law, affirming the sentence of condemnation of the Vice-Admiralty Court [sic][2] *expressly*, on the ground of *defect of proof* of an actual *bonâ-fide* transfer.

This note is affixed to the following passage in Lord Stowell's judgment in the *Minerva*, and as he was one of the Counsel for the Crown in the case of the *Nieuwe Vriendschap*, appearing with William Wynne and George Hardinge, the note is possibly from his pen. The passage runs as follows:

> There have been cases of *merchant vessels* driven into port out of which they could not escape, and there sold, in which, after much discussion, and some hesitation of opinion, the validity of the purchase has been sustained. Such cases

[1] Before the Most Noble and Right Honourable the Lords Commissioners of Appeals in Prize Causes. Appeal from the High Court of Admiralty. *De Nieuwe Vriendschap*, Bernhardus Knuttel, Master: Bernhardus Knuttel, appellant, against George Barnewell, Commander of the private ship of war *Vigilant*, his officers and mariners, the captors of the said ship and goods, respondents. [Prize Appeal Cases, Lincoln's Inn Library, vol. 8, pp. 394-510.]

[2] The case was not heard in a Vice-Admiralty Court. The ship was brought into Portsmouth and condemned by the High Court of Admiralty.

the above note], I believe, did occur during the first war in which I attended this Court, or the Court of Appeal. But whether the purchase of a vessel of this description, *built* for war, and employed as such, and now rendered incapable of acting as a ship of war, by the arms of the other belligerent—whether the purchase of such a ship, I say, can be allowed, which shall enable the enemy so far to recover himself from the disadvantage into which he has fallen, as to have the value at least restored to him by a neutral purchaser, is a question on which I shall wait for the authority of the Superior Court before I admit the validity of such a transfer. That a private merchant could lawfully do this, I shall not hold, till I am so instructed by the Superior Court. That a Sovereign Prince should embark in such a transaction, unless under such guards as would effectually remove all possibility of abuse, is what, but for the instance before us, could scarcely have been expected.

Fuller details as to the case of the *Nieuwe Vriendschap*, from the printed case preserved in a collection in the Library of Lincoln's Inn,[1] will be of value at the present time. On the outbreak of war between Holland and England in 1781 Curaçoa was full of Dutch merchants, including the *America*,[2] the *Goede Hoep*, the *Nieuwe Resolutie*, and the *Nieuwe Vriendschap*. She had sailed from Amsterdam on October 16, 1780, and duly delivered her cargo at Curaçoa. War having broken out, she delayed her return voyage for about two years, taking in her cargo of cotton and other goods between May or August 1781 and January 1783. Her master, Bernhardus Knuttel, was part proprietor of the lading. At the date of sailing from Amsterdam he owned one-sixteenth of the ship, and other Dutch merchants owned the rest of the ship. Knuttel was appointed master by Peter Willem van Lankeren, the Ship's Husband, a Dutch merchant residing at Amsterdam, where Knuttel and his family resided. Knuttel had been born a Danish subject ; but, while permanently resident in Amsterdam, where he had lived for ten years, he regarded himself as a Dutch subject. He had known the ship for three years, that is to say from 1777 [? 1780], the date when she was built at Amsterdam (p. 403b). She had never had any other name. While the *Nieuwe Vriendschap* lay at Curaçoa Knuttel was informed by P. W. van Lankeren, one of the co-owners, that in July 1782 the ship had been sold to J. B. Standaert, a merchant of Ghent, for 64,000 guilders—a fair price. His informant sent with this information an authenticated

[1] Mr. H. I. Whitaker, assistant librarian, kindly informs me that "Lincoln's Inn Library contains an almost unique collection of Prize Appeal Cases described in the Catalogue as 'Cases heard before the Lords Commissioners of Appeal in Prize Cases from March 1780 to December 1818, with the judgments in MS.' They are bound in sixty-seven large folio volumes, and consist of the actual cases printed for the use of counsel and the Court, the judgments being endorsed in manuscript as on a brief. Many of the volumes originally belonged to the Right Hon. Sir Christopher Robinson, Judge of the Admiralty Court, 1828–1833, and have his book label. The remainder were collected by James Reddie, author of *Enquiries into International Law*, 1842, and other works. Both collections were purchased by Lincoln's Inn in 1848."

[2] Captured on March 7, 1783, by H.M.S. *Dolphin*, and condemned by the Vice-Admiralty Court of Barbadoes (affirmed March 7, 1786) on the ground of fraudulent and collusive sale.

requests or consents thereto in writing, they shall designate some surgeon to perform the same. The Act further directs the chief medical officer having charge of inmates who have been operated upon to make careful observation upon such inmates, with a view to ascertaining the effect of such operation upon the mental, moral, and physical condition of such sterilised persons, and report thereon at least once a year to the Governor of the State. It is significant that the Act contains the following emergency clause: "Whereas heredity plays a most important part in the transmission of crime, insanity, idiocy, and imbecility, and our institutions for degenerates are overcrowded on account of the lack of adequate means of checking the ever-increasing numbers of this class, this Act shall take effect and be in force from and after its passage."

School-houses as Social Centres.—Several States have enacted statutes to permit and encourage the use of school-houses, and the grounds appertaining to them, for social gatherings for the entertainment, education, and recreation of the people. Their use, which must be non-denominational and non-sectarian, is not only free of cost, but in certain cases the educational authorities are required to provide funds to carry out the purposes of the Act.

Initiative, Referendum, and Recall.—The unique system by which the people may set aside laws enacted by the legislature, and pass laws independent of the legislature, is now in force in several of the Western States. These and other States have passed laws by which the people have the right to "recall" any elected official whose official acts may be considered by a majority vote of the people contrary to the public will. The same power is given to "recall" judicial decisions in certain circumstances. In Colorado an amendment has been proposed to the constitution which provides that where the Supreme Court of the State shall have decided that an Act passed by the Legislature is unconstitutional, there shall, upon the petition of 5 per cent. of the voters in the State, be a referendum to the people, who may declare by a ballot whether or not the Act shall be a law. If a majority of the voters decide in the affirmative, the Act shall remain on the statute book and be enforced, notwithstanding the fact that the Court of last resort has declared it to be unconstitutional, and therefore illegal.

The machinery for the recall of an official, according to the Colorado law, is novel. The Act provides "every elective public official of the State may be recalled from office at any time by the electors entitled to vote for his successor." Twenty-five per cent. of the electors may petition for a ballot whether or not an elected judge, senator, or other official (including the Governor of the State) shall be removed from his office. The ballot shall be accompanied by, or there shall be printed thereon, a statement of complaint, not to exceed 200 words in length, and an answer thereto by the accused official, which may extend to 300 words. The form of the ballot is: "Shall

Imperial or neutral subjects, and to have been fairly and legally sold and transferred to the said neutrals for a full, valuable, and equivalent consideration some time before the ship sailed on her voyage from *Curaçoa*."

Secondly, it was contended that the property of the Master was claimed by him on the ground that he became a Burgher of Ghent before leaving *Curaçoa*; and, as a commander of an Imperial ship "he became entitled to all the benefits of an *Imperial* subject engaged in a fair and legal voyage."

The respondents were represented by William Wynne, William Scott, and George Hardinge, who contended, firstly, "for that ships and cargoes, being in the situation in which this ship and cargo are proved to have been, could not legally be purchased by a neutral; and the attempt to purchase them under such circumstances, in order to rescue them from the danger of capture, must be considered as a departure from the neutrality, and a violation of the acknowledged rights of war"; and it was contended, secondly, even if such a sale were legal, that in fact the sale before the Court was not a real sale.

The Court affirmed the decree appealed from, except with respect to certain goods. It will be noticed that the argument adopted by the eminent counsel for the appellant—the great Thomas Erskine (1750-1823, afterwards Lord Chancellor), and Thomas Bever (1725-91), the learned civilian and author—was that since the ship and goods had been, before capture, fairly and legally sold to a neutral for adequate consideration, there was an end of the matter; and they further claimed, with some audacity, that an enemy could during war change his nationality and secure the privileges of a neutral. The counsel for the respondent—including William Scott, afterwards Lord Stowell, and the eminent lawyer George Hardinge (1743-1816), who at this time was Solicitor-General to the Queen and in a large way of practice—declared roundly that there could be no legal sale in order to rescue a ship from capture, and such an attempted sale was a violation of neutrality.

The Court that had to deal with this question was a very strong one. Charles Pratt (1714-94), first Earl Camden, sometime Lord Chancellor and President of the Council from 1782 to 1783 and from 1784 to 1794, was a very eminent lawyer, for whose decisions Lord Stowell, in after years, expressed profound respect. Sir Lloyd Kenyon (1732-1802), the Master of the Rolls, afterwards Lord Kenyon, was a lawyer of equally great capacity, while Fletcher Norton (1716-89), first Lord Grantley, though not a great lawyer, was a shrewd man of strong personality.

This Court, the printed case tells us, affirmed the decree appealed from, except with respect to certain goods. The note to the case of the *Minerva* tells us that "In the *Nieuwe Vriendschap* the Court of Appeal seems to have inclined rather to the argument of the claimant, but did not give any decision upon the question of law, affirming the sentence of condemnation of the Vice-Admiralty Court [sic], *expressly*, on the ground of *defect of proof* of an actual *bonâ-fide* transfer." It thus appears that as late as 1786 not even

Erskine could convince the Commissioners of Appeal in Prize Causes that a *bonâ-fide* transfer of ownership of ships from a belligerent to a neutral in a neutral port was a legal transfer. Erskine was opposed by the lawyer who was destined to place prize law upon a scientific footing, and it is fortunate that we possess his presentation of the law at that date. But the argument for the appellant clearly shook the Court, who found refuge in the obviously fraudulent character of the transfer; and in 1807, in the case of the *Minerva*, Sir William Scott admitted in half-hearted fashion the principle he had fought against in 1786: "There have been cases of *merchant vessels* driven into port out of which they could not escape, and there sold, in which, after much discussion, and some hesitation of opinion, the validity of the purchase has been sustained." But the case of the *Minerva* showed that he was not willing to extend the principle in any way, and would only admit it when the *bonâ-fide* character of the transfer was beyond all question and the transaction was not colourable or tainted in any fashion whatever. The cases of the *Nieuwe Vriendschap* and the *Minerva* thus may be said to decide that of the type of the *Dacia* (which in fact was carried into a French Court and condemned there), for they set up a standard of conduct to which very few German ships changing ownership to-day could attain.

THE ORGANISATION OF THE BAR IN THE BRITISH EMPIRE.

[*Contributed by* HOLFORD KNIGHT, ESQ.]

THE memorable visit of Lord Haldane to the American Bar Association at its annual congress held at Montreal in August 1913 resulted in some attention being given to the organisation of the Bar. It may be of interest, therefore, to present an account of the machinery already in existence for the purpose of regulating the affairs of the Bar in different parts of the Empire. This account can be regarded only as provisional, since, while every endeavour has been made to attain accuracy, it may well be that errors have not been altogether avoided.[1] It should also be prefaced that the organisation of the Bar in England, Scotland, and Ireland will be dealt with subsequently.

India.—In India, there appears to be some uniformity in the organisation of persons practising in the Courts, particularly in the higher branches of the legal profession. Thus, at Calcutta, Madras, and Bombay there is a Bar Committee presided over, *ex officio*, by the Advocate-General. This body is elected by the barristers practising in each High Court, and its functions are to watch the interests of the Bar and to regulate its etiquette. At Allahabad, Lahore, Nagpore, and Rangoon a similar Bar Committee exists, but the electorate is extended to include the vakils or native pleaders, and the president is either the senior practising member of the Bar or the Government Advocate. In the larger District and Sessions Courts, an organisation representing the Bar is usually to be found, and in the subordinate Courts, including the Revenue Courts, similar machinery is generally in use. Pending an opportunity of detailed inquiries in India, these general descriptions must suffice. Meanwhile, it is of interest to note that a considerable change is occurring in the composition of the Indian Bar. The following extract from an informing article in the *Times*[2] indicates the character and incidence of this development: "During the last forty years, a striking change has taken place in the professional class. The bulk of practice has

[1] For valuable assistance in obtaining the information here given, respectful acknowledgments are tendered to the High Commissioners of Australia, Canada, and South Africa. Thanks are also due and offered to the Librarians of the India and Colonial Offices and to Mr. Bingley, Secretary of the Bar Council, who was good enough to allow me to consult certain documents. I also had the advantage of conferring with the Attorney-General of Southern Rhodesia (Mr. Tredgold, K.C.), who was on an official visit to London, and am much indebted to him for additional information with regard to the position of the Bar in South Africa.

[2] May 25, 1914.

largely passed from British to Indian hands, while, at the same time, the profession has grown to an enormous extent. One typical illustration may be quoted. Attached to the Bombay High Court in 1871 there were 38 solicitors, of whom 10 were Indian and 28 English, and 24 advocates, of whom 7 were Indian and 17 English. In 1911, attached to the same High Court, were 150 solicitors, of whom more than 130 were Indian and the remainder English, and 250 advocates, of whom 16 only were English and the remainder Indian. So great a change cannot be ignored."

Finally, it should be added that there is no organisation representing the various Bars of India.

South Africa.—In the Province of the Cape of Good Hope there existed, previously to 1911, a Cape Bar meeting, which was summoned as occasion required to deal with matters affecting the etiquette and interests of the Bar. This meeting was presided over, *ex officio*, by the Attorney-General, who at that time was also Minister of Justice in the Cape Government. After the inauguration of the Union of South Africa, a movement was begun (as will be detailed later) to organise all the Bars of South Africa on a common basis. The failure of this plan was followed at the Cape by the promotion of a Bar Council for the Province, and in 1911 this body was established. It is governed by a Council which formerly included the Attorney-General, "who shall (unless otherwise determined at a general meeting of the Bar) be *ex-officio* President of such Council." By a recent amendment of the rules, the Attorney-General is no longer *ex-officio* President, and the Council now consists of seven elected members of the Cape Bar regularly practising and having regular occupation of chambers in Cape Town. Not less than two of the members must be "silks" at the time of their election. The powers and duties of this Council are as follow:

(1) To inquire into and to deal in the first instance with all matters relating to etiquette or conduct affecting the Cape Bar or any member thereof in any professional connection, or relating to fees.

(2) To caution or censure any member if, after such inquiry, his conduct has been found to be unprofessional.

(3) To report any member to a general meeting of the Cape Bar for any deliberate or contumacious disregard of the directions of the Council or for any case of professional misconduct when in the Council's opinion its censure will not suffice.

(4) To investigate and deal with any dispute between members of the Bar, or between such members and other practitioners, relative to professional matters.

(5) From time to time to prepare for submission to a general meeting of the Bar such rules relative to professional matters as may be required either for the Bar generally or for circuit.

(6) To frame regulations on the subject of fees for submission to a general meeting of the Bar.

(7) To control and deal with circuit organisation and discipline, and to make rules for submission to the Bar.

(8) To frame rules for the conduct of the Council's business.

(9) To watch all legislation or prospective legislation or regulations, legal education, or other matters of whatsoever nature which may affect the interests of the members of the Cape Bar generally or individually, and to take such action with reference thereto as may be desirable or necessary.

(10) Generally to act in the first instance as representing the Cape Bar in all professional matters.

Detailed rules have now been framed and adopted for all the matters contemplated in the above précis, and the Cape Bar Council is one of the best organised societies of the Bar in the Empire.

Admission to practise as barristers and advocates is founded upon the Charter of Justice granted by King William IV. in 1832. S. 17 of that instrument authorises the Supreme Court "to approve, admit, and enrol such persons as shall have been admitted as barristers in England or Ireland, or advocates in the Court of Session of Scotland, or to the degree of Doctor of Laws at our universities of Oxford, Cambridge, or Dublin, to act as barristers or advocates in our said Supreme Court."

The basis of qualification has been enlarged from time to time by statute. Thus under the University Act 1873, (s. 20), persons who have been admitted to the degree of bachelor of law in the Cape University are also eligible to be enrolled. It should be added that under the university statutes, candidates for the degree of bachelor of law must have previously graduated in Arts.[1]

In the Eastern Districts Division of the Cape, there is a Bar Committee elected by the practising members of the Bar. This voluntary organisation deals with all matters affecting the Bar and in cases of special difficulty consults the Cape Bar Council. Formerly, in Griqualand West, there was a similar Bar Committee which met at Kimberley, but recent judicial changes have reduced this local Bar to such dimensions as to render the continuance of the Committee unnecessary.

In Southern Rhodesia, a Bar Committee meets at Salisbury. This body is elected by the Bar, and the Attorney-General of Southern Rhodesia is *ex-officio* chairman. It is concerned with all questions affecting the Bar practising in the territory and has also been influenced by the example of the Cape Bar Council.

In the Transvaal, there is a body called the Order of Advocates of the Transvaal. Particulars are not available of this society, which is well organised and influential, but I understand that it is a voluntary combination of persons practising as advocates and that it exercises disciplinary powers similar to those possessed by other non-statutory bodies.

In Natal, the two branches of the profession are amalgamated, but a

[1] For a full description of the conditions of admission to practise in the Province by Mr. F. G. Gardiner, formerly Attorney-General, see Journal vol. xii. pp. 226–31.

separation is being gradually brought about. A powerful society exists for the purpose of safeguarding the interests of lawyers. It regulates all matters connected with the etiquette of the profession, and generally represents those who are practising in the Supreme Court and the circuit Courts of Natal.

In the Orange Free State I gather that a Bar Committee is in existence. This is a voluntary organisation elected by the Bar and an annual meeting is held at which an account of the committee's proceedings is presented.

Under the South Africa Act, 1909, the several Supreme Courts of the four Colonies became on the establishment of the Union provincial divisions of the Supreme Court of South Africa. The provisions relating to the practice of the legal profession are as follow:

"S. 115 (1). The laws regulating the admission of advocates and attorneys to practise before any superior Court of any of the Colonies shall *mutatis mutandis* apply to the admission of advocates and attorneys to practise in the corresponding division of the Supreme Court of South Africa.

"(2) All advocates and attorneys entitled at the establishment of the Union to practise in any superior Court of any of the Colonies shall be entitled to practise as such in the corresponding division of the Supreme Court of South Africa.

"(3) All advocates and attorneys entitled to practise before any particular division of the Supreme Court of South Africa shall be entitled to practise before the Appellate Division."

This consolidation of the legal profession in the four Colonies led to an endeavour to bring about the establishment of a South African Union Bar Association. In 1910, on the invitation of the Order of Advocates of the Transvaal, a conference [1] was held in Pretoria of delegates from the different Bars in South Africa at which it was decided to recommend the Bars to form an organisation for the whole of the Union of South Africa and Southern Rhodesia. For this purpose a small committee was appointed to draft a constitution but, at a later conference, difficulties were encountered which could not be overcome. These mainly related to the admission of coloured barristers and the amalgamation of both branches of the profession which still survives in Natal.[2]

Australia.—In New South Wales, a Council of the Bar was established by resolution at a general meeting of the Bar presided over by the Attorney-General on March 20, 1902. The first annual meeting of the Bar was held on June 9, 1902, when a constitution was adopted and the first election of members of the Council took place. The Attorney-General was appointed an *ex-officio* member. According to the printed statement of these proceedings, the following topics were dealt with by the Council during its first year: (1) matters relating to professional conduct and etiquette; (2) legislation, as

[1] For report of the conference by A. Davis, see 27 *South African Law Journal*, pp. 63-9.

[2] See article on "The Profession of an Advocate," 28 *South African Law Journal* at p. 335.

to which recommendations were made with regard to bills before Parliament; (3) procedure in the Supreme Court; (4) the admission of barristers to practise in the Transvaal and Orange River Colonies, raised by a resolution of the then recent Colonial Conference urging reciprocity between the various self-governing dependencies as to the right to practise in the Courts; and (5) miscellaneous matters, such as the publication of statutes and the preparation of daily Cause Lists. I am informed by the High Commissioner for the Australian Commonwealth (Sir George Reid, K.C.), who was a prominent member of this Bar Council at the time of its inauguration, that it has continued to act upon these lines, which have a close approximation to those followed by the General Council of the Bar.

It may be useful to add that admission to the Bar in New South Wales is regulated under statute (No. 22, 1898) by an Admission Board conducted by, among others, the Judges of the Supreme Court and the Attorney-General.

In the State of Victoria there is a body called the Counsel on the Roll. This is a voluntary association of persons who, notwithstanding an Act of Parliament passed in 1892 allowing either barristers or solicitors to practise as both, practise exclusively as barristers. At a meeting of counsel held on September 21, 1900, a series of rules were adopted which are binding on all members of the society. Under these rules, the Attorney-General is a member of the executive committee, which has power to admit or remove persons from the Roll, determine questions of practice or etiquette, impose penalties for unprofessional conduct, and frame rules as to retainer of counsel.

In Victoria there is also a Council of Legal Education[1] presided over by the Chief Justice, and admission to practise, either as barrister or solicitor, is controlled by a separate Board of Examiners for each branch of the profession. There is a Library Committee directed by the Judges of the Supreme Court, and free access to the library is granted to all members of the legal profession. In eighteen assize towns there are branches of the library supported by fees paid for admission to practise by barristers and attorneys.

In Queensland, according to the Australian Law List, 1914, there does not appear to be any organisation of the Bar.

In South Australia there is a Law Society presided over by the ex-Attorney-General and Premier, and governed by an elected council.

In Western Australia the Attorney-General and the Solicitor-General sit *ex officio* on the Barristers' Admission Board. This body was established by statute,[2] and has power to conduct examinations and to issue certificates of fitness to practise. It is also authorised "to inquire into complaints against practitioners for illegal, unprofessional, negligent, dishonest, or extortionate conduct, and to make a report to the Court thereon." The Court awards such punishment or otherwise on the report as it may think fit.

In Tasmania the admission of practitioners is conducted by a statutory [3]

[1] See 3 Ed. VII. No. 1887. [2] 57 Vict. No. 12. [3] 60 Vict. No. 43.

Board of Examiners appointed by the Judges, and including, *ex officio*, the Attorney-General and the Solicitor-General.

Canada.—In the Dominion of Canada the organisation of the Bar seems to have been developed to a considerable extent, both provincially and centrally. Dealing with the provincial bodies first, some detail can be given with regard to the Law Society of Upper Canada (Ontario), and the general scope and machinery of this body may be considered as a representative example of the organisation of the Bar that prevails in the various provinces.

The Law Society of Ontario was established by statute,[1] and the Treasurer and Benchers are constituted "a body corporate and politic," with power to possess real estate. The Judges of the Supreme Court act as visitors, but the Society is governed by a body of Benchers, partly *ex officio* and partly elected. The *ex officio* members consist of the Minister of Justice and Attorney-General of the Dominion for the time being, if a member of the Bar of Ontario, all members of the Bar of Ontario who have at any time held the office of Attorney-General of the Dominion or of Ontario, or of Attorney-General or Solicitor-General of the former province of Upper Canada, and any retired Judge of the Supreme Court of Ontario. There are thirty elected members chosen for five years by the ballot of the Bar. The Benchers sit in convocation each term for the call of barristers, the admission of solicitors to practise, and the acceptance of students for entrance into the Society.

The comprehensive powers of the Society, defined by statute, include the following: (1) to make rules for the government of the Society; (2) appoint examiners; (3) make rules for the improvement of legal education; (4) call and admit to practise at the Bar; (5) "The Benchers may in their discretion make rules providing for the admission of women to practise as barristers or solicitors" (s. 43); (6) examination of persons applying to be admitted as solicitors; (7) "The Benchers may make rules and regulations, not contrary to law, and dispense therewith from time to time to meet the special circumstances of any special case respecting (*a*) the admission of students-at-law, the periods and conditions of study, the call or admission of barristers to practise the law, and all other matters relating to the discipline and honour of the Bar; (*b*) the service of articled clerks, the period and conditions of such service, and the admission of solicitors to practise in the Courts, and all other matters relating to the discipline and conduct of solicitors and articled clerks; (8) appoint reporters (barristers) to report and edit decisions of the Courts.

As indicating the scope of the work of this Society, it is of interest to note a report in *The Times* to the effect that at its meeting on December 31, 1913, the Society adopted resolutions advocating commercial courts throughout Canada to try inter-provincial actions; a department in connection with the Dominion Parliament and the Provincial Legislatures which shall be responsible for the drafting of all legislation passed by those bodies in order

[1] 2 Geo. V, c. 26.

to standardise and simplify enactments; and early action to amend the Copyright Act so as to bring the law into line with the British copyright law.

When we turn to the other Provinces, the information available is not so detailed, but an indication can be given of the machinery in existence for organising the Bar.

In Quebec there is a General Council of the Bar[1] which regulates the admission of candidates to study and practise as advocates (barristers and solicitors).

In New Brunswick the Barristers' Society is established by statute[2] and governed by an elected council. By an Act of 1906, "women are admitted on the same terms as men."

In Nova Scotia there is a statutory[3] Barristers' Society. The Attorney-General sits *ex officio* on the council, which consists of elected representatives of sixteen counties.

In Prince Edward Island the Law Society is created by statute[4] and governed by an elected committee. The Society also contains a body of examiners for admission to the Bar and the examination of applicants to study law, and a committee for Law Reporting.

In Manitoba there is a Law Society[5] directed by Benchers, partly *ex officio* and partly elected by members of the Bar.

In British Columbia the Law Society[6] is governed by Benchers, of whom the Attorney-General of Canada and the Attorney-General of British Columbia are *ex officio*, the others being elected.

In Alberta a similar organisation exists, namely, a Law Society[7] governed by elected Benchers, with the Minister of Justice and the Attorney-General *ex officio*.

In Saskatchewan also a Law Society[8] exists, of the governing council of which the Attorney-General and the ex-Attorney-General are *ex officio*.

The work of these numerous and active provincial bodies has brought about the creation of a central Bar Association for the Canadian Dominion. The movement for the establishment of this society or congress came to a head as the result of Lord Haldane's visit to the American Bar Association on Canadian soil in August 1913. At Ottawa, on March 31, 1914, it was resolved by a representative conference of the provincial societies to found a Canadian Bar Association; and the first annual congress was held on March 20 and 21 of the present year. According to the reports in the *Montreal Gazette*, this notable gathering was attended by "representatives of the legal profession from Prince Edward Island to the Far West, to the

[1] See Revised Statutes of Quebec, 1909, s. 4522.
[2] Consolidated Statutes, 1903, c. 68.
[3] Revised Statutes, 1900, c. 164.
[4] 39 Vict. c. xxiv.
[5] Revised Statutes, 1913, c. 111.
[6] Revised Statutes, 1911, c. 136.
[7] 7 Ed. VII. c. 20.
[8] Revised Statutes, 1909, c. 104.

number of 250." The Solicitor-General of the Dominion was among the delegates, and the ex-Assistant Attorney-General of the United States (the Hon. James Beck) took a prominent part as a visitor in the proceedings. The delegates were officially welcomed on behalf of the Supreme Court by the Chief Justice and the Syndic (or leader) of the Montreal Bar in French. A governing council was elected, consisting of a number of representatives of the provincial societies described above, and the Minister of Justice was appointed as honorary president. Among the subjects discussed at the congress were "The Codification of Law," "The Uniformity of Law," and "Imperial Federation."

New Zealand.—In New Zealand the organisation of the legal profession has been promoted by legislation. As far back as 1878 the District Law Societies Act established law societies in the various districts of the Colony, and there are now thirteen of these bodies. They are governed by a council which is elected annually. Membership consisted formerly of solicitors only, but by an amendment of the statute this has now been extended to include barristers. These district societies are also represented on a central organisation, the New Zealand Law Society, which was constituted under the Law Societies Act, 1902. This body now represents the whole of the legal profession of New Zealand, in both branches, and is governed by a council which meets periodically during the sittings of the Court of Appeal. There is also a Council of Law Reporting of which the Attorney-General is *ex-officio* chairman.

Smaller Dependencies.—Judging from the published books of rules forwarded to the General Council of the Bar, it appears that the advice of that body was sought when endeavours to organise the Bar in the outlying portions of the Empire were contemplated. Thus, the machinery in the case of Trinidad and Tobago bears a strong resemblance to that with which we are familiar in London, and the regulations framed and adopted are largely based upon those prevailing at the Bar in England.

In Barbados there is a Council of the Bar of which the Attorney-General is *ex-officio* chairman. All practising members of the Bar are eligible for membership, and the general authority of the Council is defined as the duty of dealing with all matters affecting the profession and to take such action thereon as may be deemed expedient. In regard to the discipline of the Bar, the following rule obtains: "For the decision of all questions, except such as involve the professional conduct of a member, a bare majority of the members present shall be sufficient; but where the professional conduct of a member is under consideration, a majority of at least two-thirds shall be required to carry a decision adverse to such member's conduct, and, on such an occasion as last mentioned, the chairman shall have an original vote only." An annual meeting is held in January, at which a statement of the proceedings of the past year is made, and any member is at liberty, after due notice, to bring forward any resolution for discussion.

In British Guiana there is a Bar Association, of which the Attorney-General is chairman, and its composition and rules are identical with those described in the case of Barbados.

In Ceylon there is a General Council of Advocates founded in 1901, and its regulations appear to have been framed after consultation with the General Council of the Bar. According to the printed rules, the Council is "the accredited representative of the advocates of Ceylon, and its duty shall be, subject to resolutions of general and special meetings of the advocates hereinafter provided for, to deal with all matters affecting the profession, and to take such action thereon as may be deemed expedient." The Council consists of the Attorney-General and the Solicitor-General, with twelve practising advocates elected by the whole body of advocates resident in Ceylon. An annual general meeting is held in July, at which the Attorney-General or the Solicitor-General or the senior member of Council presides, and a statement of the Council's work during the preceding year is presented. After due notice, any resolution may be brought forward for discussion. The Council is empowered to make bye-laws.

In the Colony of Trinidad and Tobago a Council of the Bar was formed in 1901, after consultation with the General Council of the Bar in England. According to the printed rules, "the Council shall be representative of the Bar, and its duty shall be to deal with all matters affecting the profession in the Colony, including the maintenance of the rights, privileges, and customs of the Bar, the examination of proposed legislation and of the rules of practice from time to time in force, and to take action thereon respectively, as may be deemed expedient, but the Council shall not interfere with the jurisdiction, powers, or privileges of the Inns of Court or any of them." The Council consists of the Attorney-General and the Solicitor-General and ten practising members elected by the Bar. Of these elected members, at least three must be of more than ten years' standing, and at least three of less than seven years' standing, a proportion to be maintained in filling up vacancies by the Council. An annual meeting is held in October for the submission of accounts, with a statement of the proceedings for the past year, and the consideration of matters of which due notice has been given.

In the Malay States and on the Gold Coast respectively a Bar Association has been formed, but, for the present, no particulars can be given as to the composition and powers of those bodies.

In Mauritius, a Bar Council has been established recently by an Ordinance passed in 1914.[1] Under this instrument, a Council of the Bar is authorised to consist of seven practising members of the Bar, viz. three King's Counsel elected by that order and four members of the Outer Bar elected by the Junior Bar. The first election was ordered to take place within one month of the coming into force of the Ordinance, and the Council is thus defined: s. 7 (1) "The Council shall be the accredited representative of the Bar, and

[1] The Council of the Bar Ordinance, 1914.

shall have power to deal with all matters affecting the profession, including the maintenance of the rights, privileges, and customs of the Bar, and the examination of proposed legislation, and of the rules of practice from time to time in force, and to take such action thereon respectively as may be deemed expedient by the Council." Under s. 7 (2) the Council has power to express its opinion *proprio motu*, or on reference from the Procureur and Advocate-General, on any question of etiquette or professional practice. It is also empowered to inquire into all complaints against any member of the Bar which may be brought to its notice, either by the Procureur-General or by any member of the legal profession, or of the public; "and the Council shall have power to suspend such member for a term not exceeding one year or to take against him such other disciplinary measures as may be deemed expedient by the Council." In the case of suspension, the resolution must be notified to all the Courts of the Colony.

The extension to the public of power to prefer a complaint to the Council against a member of the Bar involves certain provisions which are of peculiar interest. Thus, the Council is authorised to summon witnesses and call for papers and books, etc., and on failure to appear taking place the Council is empowered to issue a certificate to that effect to any judge, who may fine the delinquent a sum not exceeding Rs. 500, "and to be imprisoned for not more than thirty days unless such fine be sooner paid." Penalties are also provided for false witnesses.

It is also established (s. 11) that "no civil or criminal action, suit, or other proceeding shall lie against any member of the Council for anything done, said, or written by him in his capacity as member of the Council or of any Committee thereof."

The Council is empowered to elect a chairman, and an annual general meeting is constituted at which accounts and a statement of proceedings are submitted. Notice of resolution can be given in writing within not less than ten days of the meeting.

Conclusion.—A general comment may be offered with regard to the foregoing details. It will be seen that while the organisation of the Bar in various parts of the Empire has reached different stages of development, some general features are common in the existing societies. Thus, power is exercised in the main over all matters affecting the legal profession, including disciplinary action over the members. Again, the governing Councils are authorised to review legislation dealing with questions relating to the profession and its work. Finally, it should be remarked that outside of the United Kingdom and Ireland, with certain notable exceptions, the two branches of the legal profession have become amalgamated and are organised on that basis.

DIVORCE IN JAPAN.

[*Contributed by* J. E. de Becker, Esq.]

In Japan divorce can be effected comparatively easily among Japanese subjects, either by mutual agreement or judicially. In ancient times, divorce was a power which vested solely in the husband, and no reason is to be found for which a wife could obtain a divorce from her husband. But such divorce, according to the arbitrary will of one party only, is not recognised by the present law except with the sanction of the Court. That the equality of husband and wife is now recognised in this respect, and that the wife is now also entitled to demand a divorce, is one vivid illustration of the fact that the position of the wife has entirely changed in modern times.

Divorce by Mutual Agreement.—Husband and wife may effect divorce by mutual agreement.[1] But when a person under full twenty-five years of age desires to effect divorce in this manner, he or she must obtain the consent of those persons who possess the right to give consent to his or her marriage—that is to say, the consent of his or her father belonging to the same house in most cases.[2] Divorce by mutual agreement takes effect immediately upon the notification thereof to the Registrar, the procedure involved being the same as that involved in the notification of a marriage.

Judicial Divorce.—*Causes for Judicial Divorce.*—Husband or wife may bring an action for divorce only in the following cases:

1. If the spouse has committed bigamy.

2. If the wife has committed adultery.

3. If the husband has been criminally sentenced to a penalty for illicit sexual intercourse.

4. If the spouse has been sentenced to a penalty for a misdemeanour or a graver offence in connection with forgery, bribery, and corruption, sexual immorality, theft, robbery, obtaining property under false pretences, embezzlement of property received in trust, and receiving stolen goods, or any of the offences specified in Arts. 175 and 260 of the Criminal Code, or has been sentenced to major imprisonment for not less than three years for an offence other than mentioned above.

5. When such ill-treatment or gross insult as to make conjugal community unendurable has been received from the spouse.

6. When (wilfully) deserted in bad faith by the spouse.

[1] Civil Code, Art. 808. [2] Civil Code, Art. 809.

7. When ill-treatment or gross insult has been received from the lineal ascendants of the spouse.

8. When his or her spouse has inflicted ill-treatment or gross insult upon one of his or her lineal ascendants.

9. When, for a period of not less than three years, it has been uncertain whether the spouse is alive or dead.

10. When, in case of a *muko-yōshi*, the adoption is dissolved, or in case of an adopted son married to a daughter of the house, the adoption is dissolved or annulled.[1]

The (legal) causes for divorce are recognised under some legal systems (the French, for example) as a sanction for violations of conjugal obligations, and under others (the German, for example) as a remedy for the impossibility of attaining the object of marriage. The Japanese provisions belong to the latter rather than to the former; but, inasmuch as they do not recognise insanity as a cause for divorce, as the German law does, they seem to incline to the former. Another point to be noted in this connection, which forms a subject of much unfavourable criticism, is that while adultery always constitutes a cause for divorce when committed by the wife, it does not do so in the case of the husband until he is criminally sentenced to a penalty for illicit sexual intercourse in consequence thereof.

Causes for which Actions for Divorce are to be Rejected.—(*a*) In case of Nos. 1 to 4 inclusive of the causes for divorce mentioned above, no action for divorce can be brought if one of the spouses has consented to the act of the other.[2] (*b*) In case of Nos. 1 to 7, no action for divorce can be instituted if either the husband or wife has condoned the act of the other or the act of the other's lineal ascendants.[3] (*c*) A person who has been sentenced to one of the penalties mentioned in No. 4 cannot bring an action for divorce on the ground that the same ground exists in regard to his or her spouse. (*d*) An action for divorce on any of the grounds mentioned in Nos. 1 to 8 cannot be brought after the lapse of *one year* from the time when the person entitled to institute such action has obtained knowledge of the fact or after the lapse of *ten years* from the moment of the occurrence of the fact[4]; and an action for divorce on the ground specified in No. 10 cannot be brought after the lapse of *three months* from the time when the party concerned has obtained knowledge of the dissolution or annulment of the adoption.[5] (*e*) An action for divorce on the ground mentioned in No. 9 cannot be brought after it has been ascertained whether the spouse is alive or dead.[6] (*f*) An action for divorce on the ground mentioned in No. 10 cannot be brought when the party concerned has waived the right of divorce.[7]

Legal Divorce.—In case a husband and wife have been adopted, or an adopted child has been married to another adoptive child of the adoptive parent, if the wife is obliged to leave the adoptive house through dissolution

[1] Civil Code, Art. 813. [2] Art. 814, 1. [3] Art. 814, 2.
[4] Art. 815. [5] Art. 818, 2. [6] Art. 817. [7] Art. 818, 2.

of adoption, the husband must, at his option, either dissolve the adoption or effect divorce.[1] If the husband elects divorce, such divorce is neither divorce by mutual agreement nor judicial divorce, so that it may be distinguished as "legal divorce." Though there is no special provision in the Code as to how such divorce is to be effected, it seems reasonable to conclude that it takes effect upon notification being made to the Registrar in the joint names of the husband and wife; but if the wife refuses to agree to make such a notification, there is perhaps nothing else to be done but to bring an action for divorce. It is certainly a defect in the law that provisions on this point have not been included either in the Civil Code nor in the "Law Concerning Family Registry" nor in the "Law of Procedure in Actions Concerning Personal Status."

Effect of Divorce.—The effect of divorce is to dissolve conjugal relations and to extinguish, as regards the future, all results of marriage so far as they may have affected personal status or property.

Marriage and Divorce of Foreigners.—As regards foreigners:

(*a*) The effect of marriage is governed by the law of the home country of the husband at the time of the marriage.

(*b*) The effect of divorce is governed by the law of the home country of the husband at the time of the occurrence of the fact forming its cause.

(*c*) A Japanese Court cannot make any adjudication of divorce unless the fact forming its cause also constitutes a cause for divorce according to Japanese law.

(*d*) As regards arrangements relative to marital property, the law of the home country of the husband at the time of the marriage governs.

(*e*) Marriage settlements are only valid if registration of same are made previous to the marriage. If foreigners, subsequent to their marriage, become domiciled in Japan, they must register the settlement within one year, and if they fail so to do the contract cannot be set up in Japan against their successors or against third persons.

(*f*) In the case of Japanese marriages abroad, the Japanese Minister or Consul is authorised to register such marriages; and in the case of foreign women marrying Japanese subjects abroad in Embassies or Consulates great care should be exercised in seeing that they are duly inscribed on the Register of the Embassy or Consulate having jurisdiction. Until such registration has actually been made, the union is not recognised in Japan[2]; but at the same time a marriage celebrated abroad according to the forms of the *lex loci* is perfectly valid.[3] The fact of such a marriage having taken place can be proved in the Japanese Courts by an officially certified copy of the entry in the Register. Arts. 59, 60 and 61 of the "Law Concerning Family Registration" contain provisions governing the registration in Japan of marriages contracted abroad.

[1] Civil Code, Art. 876. [2] Civil Code, Arts. 775 and 777.
[3] "Law Concerning the Application of Laws in General," Art. 13.

(*g*) The Japanese law recognises marriages between Japanese and foreigners, and between foreigners themselves, entered into according to the form prescribed by the Civil Code and ancillary laws. The Register may be either notifie ` orally, or in writing, and in either case, immediately that official has accepted the notification (from persons under no legal disability) the parties are man and wife and the marriage is celebrated and complete.

In the case of the intermarriage of foreigners, or of foreign men with Japanese women, in the Japanese Empire, the usual custom is to register the wife in the Consulate of the country to which the husband belongs, and when this is done the wife is, of course, publicly recognised as a co-national with her husband. Such being the case, Japanese women marrying foreigners lose their Japanese nationality by the rules of private international law, and with it their capacity to enjoy the rights of Japanese subjects. It may be added that much unnecessary trouble has been caused to foreign residents in Japan owing to the Consular Officers of certain Powers not being permitted to register the marriages of the subjects or citizens of their nation which have been contracted solely according to the Japanese *lex loci*; and it seems desirable that the various Foreign Offices should, as a measure of courtesy and convenience, issue instructions to the Consuls under their jurisdiction to accept Japanese official certificates of marriage and register marriages so certified. Under present circumstances, when (for example) a British subject desires to marry a lady who is a Japanese subject, the would-be husband and wife have first to comply with the Japanese formalities and then must be remarried at the British Consulate. Moreover, as many people desire a Church marriage for religious or other reasons, the pair have then to go to Church for a third ceremony.

FRANCISCUS A VICTORIA (1480—1546).

INTERNATIONAL LAW AND WAR.

[*Contributed by* COLEMAN PHILLIPSON, M.A., LL.D., LITT.D.]

MODERN international law undoubtedly owes an inestimable debt to the work of Grotius. This fact is universally recognised, and unceasingly reiterated. But we are, too often, apt to forget that Grotius's work itself owes a very great debt to numerous forerunners. In the middle ages, the glossators and commentators, the Fathers, and the ecclesiastical doctors often discussed incidental questions concerning the law of nations. The Roman legal conceptions of *ius civile*, *ius naturale*, *ius gentium*, as well as the notions of *ius divinum* and *ius humanum*, were elaborately expanded, and with marked acuteness adapted to a large variety of inter-statal relationships. This work engaged the attention of distinguished civilians like Irnerius, Bartolus, and Baldus; of authoritative canonists and Fathers like Tertullian, St. Augustine, Isidore of Seville, who discussed the legitimacy and kinds of war, certain rights and obligations of belligerents; and of pre-eminent theologians like St. Thomas Aquinas, who considered many matters arising out of the conduct of warlike operations. Later we find more complete treatises on special subjects. The age of monographs begins in the fourteenth and fifteenth centuries, when divines and professors of law examine with comparative fulness not only questions of war and reprisals, but also problems emerging in time of peace. During this period appear productions of writers like Joannes de Lignano, Joannes Lupus, Martinus Laudensis, Franciscus Arias, Jacobus de Castillo, and others. In the age of the Reformation further progress is made. The contributions of moral theologians, who had succeeded the Aristotelian schoolmen, substantially and effectually add to the literary edifice; it is, indeed, yet slender, but it is now well risen from its lowly foundations and is growing apace. In this work no writers deserve more of the world than a group of Spanish scholars who, endowed with logical acumen, legal spirit, remarkable impartiality, and signal independence of opinion, analyse some of the fundamental questions of international law, extend its field of inquiry, fearlessly investigate the jurisdiction of the Pope, the arrogant claims of contemporary sovereigns relying on the might of the sword, condemn the unrestrained barbarities of warfare and propose regulations for combatants, determine the essential character of a society of States, define the rights and obligations of the constituent members with regard to each other and also to barbarian communities. Thus they stimulate the judicial consciousness of

nations, and prepare them for the recognition and acceptance of an enlarged body of international law. Of this group of Spanish scholars, the earliest noteworthy representative is Franciscus a Victoria.

Life.—Franciscus a Victoria (Francisco da Vitoria) was born in 1480 in Vitoria, the capital of the province of Alava, on the Bay of Biscay. He received his early instruction at the Dominican monastery of St. Paul, Burgos. In 1506 he proceeded to Paris. He continued his education at the seminary of St. James—"in gymnasio san-jacobeono"—and afterwards took up the work of teaching. After an absence of some nineteen years, he returned to his native country, as a member of the Dominican Order. The Dominicans had organised in their convent of St. Gregory, at Valladolid, a "studium generale," a kind of training-college, where instruction in philosophy and theology was given to young monks destined for a professorial vocation. Victoria was there appointed rector (regens); in this capacity he delivered the principal lecture each day, and directed the general studies of the pupils. Three years later (1526) he obtained in open competition the chair of theology at the university of Salamanca, which he held in person till 1544, and by proxy till 1546, the year of his death.

The university of Salamanca—of which Victoria's countrymen Suarez and Vasquez were afterwards illustrious members, and contributors, too, to the field of international law—was founded in 1212 by Alfonso IX., King of Leon, and was organised and endowed by his son Ferdinand, and his grandson Alfonso the Wise. It was later enriched by Pope Benedict XIII., and in the sixteenth century it became the most important university in Spain. It comprised seventy chairs, and received many foreign students. In 1546, there were over five thousand; in 1584, there were nearly seven thousand. Among these there were many, no doubt, who were "estudiantes que no estudian"—students who did not study—as in all universities. None the less, thanks to the influence of men like Victoria, Salamanca acquired the epithet of "Athenas española," the Athens of Spain.

The Renaissance movement had reached the distant peninsula in a very enfeebled state. Humanism failed to establish itself there among society at large; there were but a few sporadic groups of enthusiasts attached to the new culture. After the compact at Bologna, 1530, between Charles V. and Clement VII., Spain definitely became antagonistic to the humanistic movement. The Inquisition kept a vigilant eye on every suspected pursuit. The Reformation had never possessed any vitality here except in one or two places like Seville and Valladolid. "Erasmianism," which had at one time gained a footing in the country, speedily vanished. "Our nation," wrote Mariana later, "has never had a great inclination for these literary studies and these humanities." The Iberian mind, characterised by a vigorous spirit of independence and individuality, together with a strong religious faith, which had been strongly fortified by the long protracted conflict with the infidels, found its expression, rather, in romance and drama, in exploration, and

in theology. In the middle ages Paris had been the great centre of scholasticism and theology; from about 1530, this distinction passed to Spain, to her universities of Alcalà, Cordova, Evora, Coimbra, and—most important of all—Salamanca.

In the university of Salamanca, Victoria played a conspicuous part. He was, indeed, the initiator of the great movement. He introduced more systematic methods of teaching, thoroughly reformed the substance and exposition of theological doctrine, and imparted to it order and clearness. According to the account given by his famous pupil Melchior Cano (in his book *De locis*), he purged theology of extraneous elements that had a too philosophical or "rational" character; he eliminated many idle and puerile questions that had attracted over-curious minds. He brought it back to the original sources which, he conceived, ought to nourish it—the Scriptures, the definitions and edicts of Popes and Councils, the works of the Fathers, and especially the *Summa* of St. Thomas Aquinas. Writing towards the end of the sixteenth century, the Dominican Bañez speaks of the mediocre condition of scholastic theology in Salamanca before the arrival of Victoria, "an eminent master of our order, who, by the influence of his lectures alone, like a second Socrates, restored to the doctrines of the school all their brilliance." Theologians and philosophers, recognising his supremacy, sometimes referred to him also as the "alpha," and the "princeps."

Victoria delivered his lectures slowly, so that his pupils could more easily take them down—a method much appreciated by students when books were rare, and when enthusiastic disciples could readily incorporate in their subsequent publications the finished product from their master's mint. Throughout he avoided dryness, complicated exposition, and cumbrous accumulations of learning. Grandiloquence, rhetoric, verbal subtlety, and other questionable devices honoured by many in those days, he consistently eschewed. Trained in his own country under Latinists like Antonio de Lebrixa (Nebrissensis) and Lucio Marineo, and afterwards under the humanists of Paris, he was able to impart to his utterance a distinction of style; his language is marked throughout by the rare qualities of purity, conciseness, and limpidity. At the same time, doctrinal precision was not sacrificed to academic elegance.

During his long stay at the university, Victoria not only received the respectful homage of his disciples and auditors, but he also enjoyed the high consideration of kings and emperors, who consulted him on various momentous questions; our own Henry VIII. referred to him the divorce controversy, Charles V. submitted to him problems arising out of the conquest of the New World, and the Pope laid before him difficult cases of conscience. To all he replied with frankness and independence of mind, with sincerity and outspokenness—qualities precious and rare at all times, in that age much more so. A master like Victoria could not but prove a stimulating inspiration to congenial pupils; it is not surprising, therefore, to

find among these eminent men like Melchior Cano, Dominicus Soto, Francisco Suarez, Bartolomeo de Medina, and others. Victoria was, then, as famous for the fruit of his teaching and his disciples as for his learning, his reformed methods, and significant contributions to the great controversies of the day.[1]

At his time Spain was at the height of her greatness. After a struggle of eight centuries the small kingdoms of the Peninsula were brought into national unity. Her power was asserted in all parts of the world; her empire was of enormous extent. Military power was necessary to maintain political predominance. Wars had to be waged, relationships with other States established. Thus some of the enlightened minds of the time, struck by the absence of order and the arbitrary character of power, came to realise that it was essential to regulate juridically such relationships, and establish rules of legitimate warfare. We find, therefore, a remarkable series of contributions on questions of international law produced by Victoria, Soto, Suarez, Vasquez, Ayala, and others. In reading their works, we must bear in mind the nationality of the writers, their position and profession, the time in which they wrote, the condition of their country. Thus, in the case of Victoria, it is necessary to remember that he was a Spaniard, that he was a Dominican, a skilful theologian, an able scholastic, a university professor, and a contemporary of Charles V. A due recognition of these facts will help us to understand why he seizes upon certain international questions, from what point of view he investigates them, by what method he expounds them, in what form and in what spirit he infers his conclusions.

Works.—During the twenty years Victoria lectured at Salamanca he could not be prevailed upon to publish the substance of his teaching; so that very little of his work has been given to the world. That is, no doubt, why he is not known better, and why we do not find his name mentioned frequently in the citations of subsequent writers.

His most considerable work is the *Relectiones theologicae*, which first appeared, more than ten years after the author's death, at Lyons, 1557. (This was described by the editor of the third issue as a defective edition, "vitiosa et corrupta.") A second and amended edition appeared, 1565, at Salamanca; a third at Ingolstadt; a fourth at Lyons, 1587 (which is the one used by the present writer)[2]; others at Antwerp, 1604; Salamanca, 1680; Cologne, 1686. In spite of these numerous editions, the book is very rare. A reprint and a translation would be valuable accessions to the literature of international law. Victoria left also some lesser writings on theology and morals: *Confessionnario* (1562); *Instruccion y Refugio del*

[1] "Victoria clarus scientia theologica, clarior methodo quam inauguravit, clarissimus discipulis et fructibus quos per illos retulit" (Hürter, *Nomenclator litterarius*).

[2] It may be noted that a special interest attaches to this edition, in that it is a Spanish writer's work on the law of war, which was issued at a time when his sovereign was preparing the "Invincible Armada" for the purpose of crushing England.

Anima (Salamanca, 1552); *Commentaria in universam Summam Theologiae Sancti Thomae* (MS.).

The *Relectiones theologicae* comprises thirteen *relectiones*, or lectures, on various subjects—marriage, magic, simony, the power of the papacy, the position of civil sovereigns, and other questions of ecclesiastical and public law; but for us the most interesting portions of the work are those dealing with matters of international law, viz. the relation of civilised States to barbarian communities, and, as a logical sequel to this, the law of war. The fifth *relectio*, "De Indis"—a valuable document—presents a clear, unbiassed examination of the Spanish claims to dominion over the New World, and with an independence that no doubt seemed to many contemporaries unpatriotic, rejects most of them. The sixth *relectio*, "De iure belli," is a systematic investigation of many important questions of the law of war. The general treatment and the conclusions arrived at show the author to be a notable precursor of Grotius, and in many respects impart to the work a more progressive tone and a more modern significance than are discernible in the corresponding parts of the later writer's production. In his preliminary discourse, the Dutch jurist, being conscious of his superiority to every predecessor, casts a contemptuous glance at a number of writers, including Victoria. That Grotius was superior to any other earlier or contemporary competitor in the same field we will willingly allow. That he was the veritable "father of international law" we certainly shall not admit. That Victoria's contribution is one to be carelessly cast aside is a view we must strongly repudiate.

Victoria sets forth his argument in accordance with the best and purest form of the scholastic method. In his search for the truth, he first proposes a "thesis," and proceeds to determine whether it can be justifiably maintained. Accordingly he brings forward, on the one hand, all the arguments he can find in his support, and, on the other hand, all the objections that might well be urged against it. Each argument for and against is treated separately; and all are arranged in an orderly and systematic manner, so that we may see what value is to be attached to them. Thus the final conclusion is perforce the outcome not of sentiment and prejudice, but of reason operating in a judicial, scientific spirit. The "De Indis" exemplifies this procedure in a masterly fashion.

The International Law Doctrines of Victoria.—Victoria lived in the Reformation age. It was an epoch of great importance in the evolution of political thought as much as in that of religious doctrine. Mediæval conceptions were now gradually but surely giving place to modern views. National consciousness was developing; the essential characteristics of the State were being defined; the true significance of sovereignty was determined. New lands were discovered, and the mother country therefore demanded from other States a recognition of her rights to exercise colonial dominion. Grant by the Pope is still claimed to be a valid title, though the rights

conferred by discovery and actual occupation ("ius inventionis") increasingly predominate. The mediæval claim of sovereignty over great portions of the oceans continues to be asserted by maritime States. The Pope and the Emperor have not yet abandoned their pretensions to world dominion. International intercourse increases, so that regulations are expressly made respecting ambassadors and the treatment of aliens. But a Machiavellian spirit is too frequently manifested in interstatal transactions; deliberate perfidy is not uncommon. Wars are still marked by atrocious and barbarous practices. The non-combatant, inoffensive population is treated almost as rigorously as the combatant forces. The obligations imposed by neutrality are scarcely recognised. Here and there we find in actual warfare slight mitigations due to the influence of certain moribund remnants of the old code of chivalry. On the whole we may say that in practice international law is still in a very fragmentary and irregular condition.

Now the doctrines of men like Victoria show a remarkable advance on the prevailing conditions. They indeed contributed much to the development of modern international law.

Society of States: Nature of International Law.—Victoria takes the conception of *ius gentium* from Roman jurisprudence, enlarges its sense, and applies it to the relations of peoples. For him, then, international law comprises the rules which natural reason has established between all nations. "Quod naturalis ratio inter omnes gentes constituit vocatur ius gentium." The substitution of the word "gentes" for the word "homines" in the definition familiar to students of the Institutes[1] is a proceeding simple enough in itself; but it is in reality a noteworthy change, involving a fundamental departure from old notions. "Ius gentium" means the law *of* nations; "ius inter gentes" means the law *between* nations; and in this seemingly slight difference lies a multitude of important implications. Thus the expression "ius inter omnes gentes," which has frequently been attributed to our own jurist, Richard Zouche, is really due to Victoria (though it must be admitted that the later writer employed it more consistently, and with a more clearly defined significance). It implies a recognition at once of the independence and of the interdependence of States, and of their reciprocal rights and obligations. It points to the existence of a juridical tie between nations, which constitute therefore an international society. The principle of "ubi societas ibi ius" we may apply in a wider sense. The world is not, Victoria emphasises, a fortuitous inorganic conglomeration of isolated peoples. It is, rather, an organic totality, a living entity whose constituent parts need to be harmonised by the establishment and acceptance by them of common laws. He rejects the prevailing doctrine that as a State has no superior to limit its authority, its right over its territory is more absolute than that of a landlord over his field; he insists, on the contrary, on the inevitable interdependence of States, and on the limitations consequent thereon. There is a "societas

[1] I. 2. 1.

naturalis gentium." This implies the notions of "state of nature" and "social contract." Originally men possessed everything in common, and so exercised equal rights over everything. Afterwards distinct tribal communities grew up, occupying more or less varying localities. Then came the formation of national groups on more clearly defined territories. But it was never the intention of these nations to suppress all intercourse natural to men; so that "rights" incidental to the state of nature were preserved and perpetuated. This maintenance of interstatal communication and intercourse necessitates the employment of ambassadors, and a recognition of their inviolability. A sovereign is legitimately empowered to compel foreign States to respect the rights of his own subjects. The "ius communicationis" is fundamental; it postulates the right of immigration, and the duty of States, to admit strangers, subject, of course, to the reservation "Sine iniuria aut damno." "Nolle accipere hospites et peregrinos est de se malum." Accordingly inhabitants of foreign countries possess the right to settle—with reasonable limitations, it may be—in the territory of another State, and eventually to acquire its nationality, and children born of domiciled aliens acquire the rights of citizenship in the place of their birth. No one can be outside the international community; but the international community comprises only States; therefore no one can be outside some State or other, that is, every person must belong to tate. It is to be noted that for Victoria this international community is not confined to the Christian circle; his view is much more generous and much more comprehensive than that current in his day.

Although territories have been occupied and appropriated by political communities, certain things nevertheless remain the common property of mankind, especially so the seas and the great rivers. Consequently ships of all nations are equally entitled to navigate them. Again, the division and appropriation of things do not militate against the right to carry on general intercourse between the countries of the world; the "ius commercii" forbids the imposition of disabilities on inoffensive strangers. Such intercourse is not restricted to the exchange of material commodities; it comprises also the interchange of ideas. Therefore a Christian nation is entitled to preach the Gospel to a heathen community. Now these rules not only follow from natural reason and necessity, but they are also sanctioned by the universal consent, express or tacit, of mankind, or by the consent of the majority of men. And what is accepted by the majority of men is also binding on the minority. It follows as a necessary consequence that all these rights may be exercised and the corresponding obligations enforced, if necessary, by war. It may be, however, that a weak State has suffered injury at the hands of a more powerful one. In that case other States may lawfully intervene and demand due reparation from the offending State, on the ground that no country subsists in total isolation and absolute independence, that all States are bound together in juridical solidarity, and that the violation of

the right of one of them at the same time affects the others. Thus Victoria shows himself an uncompromising opponent of the doctrine of non-intervention. He maintains that each State has the right—indeed that it is under the legal obligation—to compel a recalcitrant State to respect international law, the common law of the "societas gentium."

It follows, from the above considerations, and especially from the principle of State independence, that the claims of world dominion made by the Emperor or by the Pope were not justifiable. In regard to the latter, Victoria's view is opposed to that of a long line of jurisconsults and theologians, such as Hostiensis, Sylvester, Bartolus and his school, St. Thomas Aquinas, Herveus, and many others. Victoria repudiates the pretensions of the Papacy [1] to be "orbis dominus" in things temporal. He points out that the very founder of Christianity was not the temporal sovereign of the whole world; and the Vicar is assuredly not greater than his Lord.[2] He denies that the Pope possesses a legitimate title to exercise a temporal jurisdiction over civil sovereigns in any matters not essentially involved in the "finis spiritualis." ("Papa habet potestatem temporalem in ordine ad spiritualia.") Thus, with a view to obviating the spiritual ills consequent on a war between Christian rulers, he may well arbitrate between them if they recognise his authority. Hence the Papacy cannot claim to act as a court of appeal from decisions of princes, and is not entitled to intervene in the controversies of sovereigns regarding questions of subjection and titles to kingdoms. It cannot award territories to rulers, and is not entitled to deprive rulers of their rights of sovereignty. The Pope's dominion is limited to matters spiritual, and even then, as regards independent princes, within certain bounds.

Relationship between Civilised States and Barbarians. — For the publicists of the time this usually meant the relation between Christian countries and infidel communities. This part of Victoria's work [3] is a truly valuable document, which investigates with insight and impartiality the wide pretensions of his countrymen to exercise dominion in the newly discovered West. He claims at the outset that questions involving Christians and barbarians concern theology as much as jurisprudence; so that he, as a theologian, thinks himself perfectly justified in entering this field of discussion.

Three problems present themselves for solution: (1) What right have the Spaniards to subject the barbarians? (2) What power have the Spanish rulers over the barbarians in temporal matters? (3) What power have they or has the Church over the barbarians in spiritual matters? These questions led to a great deal of controversy in Spain. Speaking generally, the Spanish pretensions were supported by the official legists and casuists, including the

[1] Relect. i. ii. "De potestate ecclesiae." Relect. iv. deals with the power of the Pope and the Council ("De potestate Papae et Concilii").

[2] Relect. v. "De Indis."

[3] Relect. v, "De Indis, sive de iure belli Hispanorum in barbaros."

Franciscans; but they were denied or doubted by the Dominicans, including Victoria and his disciples Cano and Soto, who support their arguments by testimony drawn from the Bible, from the writings of the Fathers, schoolmen, canonists, civilians, and from the edicts and decisions of Councils.

First it is necessary to ascertain the position of the Indians, and to decide whether they exercised legitimate sovereignty and were true owners, "veri domini," private and public, before the arrival of the Spaniards.[1] Now it may be alleged, on the authority of Aristotle, that barbarians are naturally slaves, and, according to the civilians, slaves cannot own property. But when the Spaniards arrived, the Indians were in peaceful possession of property, both publicly and privately. If they did not exercise true ownership, they must have lost it in some way, for example, through sin, infidelity, or mental derangement. In the first place, the view that ownership is founded in grace is a heresy; it was repudiated by the Council of Constance, which declared that mortal sin does not impede civil and true dominion ("Peccatum mortale non impedit dominium civile et verum dominium"). Secondly, ownership is not lost by reason of infidelity ("Dominium non perditur ratione infidelitatis"). The Scripture and St. Thomas Aquinas recognise the sovereignty of infidels in their own territories. Only by a just condemnation of "ius humanum" may heretics be deprived of proprietary rights.[2] Thirdly, the barbarians are possessed of reason; they are not "insensati vel amentes." They have precise notions of the things around them; they have their own religion; they carry on intercourse with each other—all these facts show the presence of reason. Their inferiority is due simply to inadequate education; in this respect there is no difference, Victoria strikingly points out, between Indians and many Spanish peasants but little removed from the brute creation—"cum etiam apud nos videamus multos rusticorum parum differentes a brutis animantibus." Further, they have a political organisation, "ordo rerum," and have established States ("civitates"); they recognise marriage and family life; they have laws and magistrates. In a word, they possess and exercise sovereignty.[3]

Next Victoria examines several titles alleged by the Spaniards for subjecting the barbarians, and he finds them untenable and illegitimate, "non idonei nec legitimi." Thus he rejects the world lordship of the Emperor. By "ius naturale" all men are free; "ius divinum" did not bestow universal dominion on pre-Christian sovereigns, nor has "ius humanum" given this to the Emperor. Here Victoria refutes the view of the Bartolists, and especially that of J. de Lignano.[4] The alleged grant of the Pope is not

[1] Relect. v. s. 1.

[2] "Haereticus iure divino non amittit dominium bonorum suorum ob haeresim commissam."

[3] It is interesting to recall the Conference of Berlin, 1885, where—several centuries after Victoria expounded his views—the principle of respecting the independence of barbarian peoples and their rudimentary sovereignty was solemnly proclaimed.

[4] *Tractatus de bello*, iii. 13.

a valid title. He never possessed civil dominion over the world, as has already been shown. Even if he possessed such secular power, he could not bestow it on secular princes [1]; for such power would be indissolubly inherent in the papal office, and successors could not be ousted from their equal rights. Whatever temporal authority the Pope possesses has been shown to be based on his spiritual authority; but he has no spiritual power over the infidels, therefore he has no temporal power over them,[2] so that he cannot subject them to the Spanish rule. He cannot give sovereignty that he does not possess himself. Accordingly the Spaniards cannot justly make war on the Indians for refusing to acknowledge the jurisdiction of the Pope; and when they first reached the barbarian country they took with them no right to occupy it. Again, the claim on the ground of discovery, "ius inventionis," is not valid; occupation is a mode of acquiring territory having no owner, "illa quae sunt deserta, quod in nullius bonis est"; but, it has been shown, the barbarians were true owners; hence their lands were not "res nullius." Is rejection by the Indians of Christian preaching a good ground for Spanish dominion? Victoria is opposed to the opinion of several canonists [3] that a state of perpetual war exists between Christians and infidels, and that it is necessarily a just war on the part of the former. Those who know not the Word are in invincible ignorance, and so do not commit sin. To carry conviction teaching must be supported by proper reasons and examples and truly religious life of the teachers; on the contrary, declares Victoria, he has heard only of "multa scandala seu facinora et multas impietates." [4] But even if the Faith has been proclaimed to the barbarians in an adequate manner and rejected by them, a just cause for war and spoliation does not arise, since acceptance of the Faith should be voluntary.[5] Further, submission to Spain does not render the Spanish claims legitimate; for it was made through error, fear, or compulsion. The Indians did not understand what the Spaniards demanded. Any convention is vitiated by the presence of force. Moreover, was the person who consented really a chief having full competence to treat in this manner? Consent of a chief is not sufficient to bring about a cession of sovereignty; consent of the people, at any rate of

[1] Victoria is thinking of the famous bull of May 14, 1493, by which the Pope Alexander VI. gave the Spanish all the territories discovered or to be discovered by them to the south or west of an imaginary line (called the Alexandrian line) drawn from the Arctic to the Antarctic pole; whilst that situated to the north or east would go to the Portuguese. A year later, June 7, 1494, the Treaty of Tordesillas modified this partition of the world.

[2] Victoria's view is here contrary to that of Innocent IV. (d. 1254), *Apparatus quinque librorum decretalium*; J. de Lignano, *op. cit.*; H. Bonet, *Arbre des batailles*, iii. 2. On the other hand Soto and Suarez follow Victoria.

[3] *E.g.* Hostiensis (d. 1272), *Summa aurea*, i. 34, v. 6; followed by J. de Lignano, Lodi, Bellini, Guerrero.

[4] Relect. v. s. 14. p. 200.

[5] Similarly, Innocent IV., *op. cit.* ("De voto"), declares that infidels may not be compelled to accept the Faith; every man possesses free will. To the same effect, Covarruvias (1512—1577)—the "Spanish Bartolus"—and Suarez, *De iustitia et iure*, iii. 13. 5.

the majority, is also essential—"sicut nec e contrario ipsi domini possunt novum principem creare sine assensu populi." Finally, does the commission of abominable practices by the barbarians give the Spanish a right to destroy them and take away their lands? Victoria asks whether those who are to destroy them are themselves faultless.

The author now proceeds to set forth the titles by which Spain might legitimately claim dominion over the Indians. It has already been shown that every nation has a natural right of communication and intercourse with other nations. Therefore the Spaniards may, so long as their proceedings are inoffensive, go to the territories of the Indians, remain there, trade with them, and enjoy certain local rights; and should they meet with opposition, they may first use reason and persuasion, and, failing this, force. If security is not obtained then, they may subjugate the natives and occupy their lands. A second title is found in the right to propagate Christianity. In the exercise of his temporal power "in ordine ad spiritualia," the Pope, whose essential mission it is to spread the Faith, is entitled to regulate the affairs of Christian princes with the object of attaining this end. Therefore he may confide to some particular nation, for example the Spanish, the work of evangelisation; he may forbid others to take it up, on the ground that if several princes are charged with the same mission, inconvenience and friction might result, and the progress of the work might be impeded. So long as the Indians freely allow the Spaniards to preach the Gospel, the latter may not wage war against the natives and occupy their territory, on the plea of extending the Faith. But if there be obstruction, the Spaniards may employ such forcible means as may be necessary for accomplishing the work, and even go to the length of making war, occupying the country, deposing the chiefs, and substituting others. Other good titles for the subjection of the barbarians of the New World may be briefly mentioned. If the Spaniards have succeeded in making converts among the Indians, they are justifiably entitled to go to the protection of the believers, on whom the local rulers are trying to force the former idolatry. Where there is a considerable body of Christian converts, the Pope may, on their petition or for some other sufficient cause, give them a Christian sovereign. The Spaniards are permitted to take whatever measures may be necessary to protect innocent people from tyrannical proceedings of their barbarous rulers. Similarly, they may go to the protection of barbarian allies, make war on the infidel assailants and annex their lands. Again, the Spanish monarch may legitimately exercise the rights of sovereignty over the Indians, if they elect him knowingly and of their free will. Finally, a good claim might possibly be made out—though, Victoria says, it is debatable—on the ground that the barbarians show themselves incompetent to establish and administer a regular State, even within human and civil bounds, "quod non sint idonei ad constituendam vel administrandam legitimam rempublicam, etiam inter terminos humanos et civiles."[1]

[1] Relect. v. pp. 218, 219.

The Law of War.[1]—The all too brief "De iure belli" forms a sequel to the preceding "De Indis," but it is, from our point of view, the most interesting and valuable part of Victoria's juristic work. It is well to say at the outset that it does not purport to be a complete treatise, embodying a full development of this branch of international law; it is only a "lecture" by a theological professor, who sets before his students, at a time when war was the order of the day, some solutions to a few important questions. In the previous examination of the titles invoked by the Spanish for occupying the territories of the Indians, we have seen that it is only through the right of war, waged for various just causes, that their provinces may be legitimately annexed. It is necessary, therefore, to discuss briefly the law of war. The author observes that he will not be able to deal with all the problems that arise in such discussion, or treat the subject as fully as its greatness and importance demand; he will therefore have to content himself to examine briefly the main principles.

(*a*) First of all, then, he presents four principal questions: (1) Is it lawful for Christians to make war at all? (2) Who is invested with the necessary authority to make or declare war? (3) What may and what ought to be the causes of a just war? (4) What may legitimately be done in a just war?[2]

(1) *Is it lawful for Christians to make war at all?*—After the manner of the scholastics, Victoria begins by setting forth the thesis contrary to the one he supports. One might believe, he says, that Christians are forbidden to make war, that they may not even defend themselves; for do we not read: "Avenge not yourselves, but rather give place unto wrath"[3]; "Resist not evil; but whosoever shall smite thee on thy right cheek, turn to him the other also"[4]; "All they that take the sword shall perish with the sword"[5]? But these are counsels and not precepts—"omnia haec non sunt in praecepto, sed in consilio."[6] The Catholics are generally agreed on this subject; but Luther, who has left nothing unspoiled that he has touched, "nihil incontaminatum reliquit," has denied to Christians the right to take up arms even against the Turks; he relies as much on the passages quoted above as on the following argument: "If the Turks invade Christendom, it is because such is the will of God, and it is not permitted to resist them." In this respect, as in others (remarks Victoria), Luther has not been able to impose his ideas on the Germans, a people born for arms. Tertullian appears to adopt a similar view.[7] But putting aside these singular opinions, "relictis

[1] Relect. vi. "Di iure belli," pp. 220-52, in the 1587 edition referred to.

[2] Relect. vi. p. 226: "An omnino Christianis sit licitum bella gerere? Apud quem sit authoritas, aut gerendi aut indicendi bellum? Quae possint et debeant esse caussae iusti belli? Quid in bello iusto et quantum liceat in hostes?"

[3] Rom. xii. 19. [4] Matt. v. 39.

[5] Matt. xxvi. 52. [6] Relect. vi. p. 226.

[7] *De corona milit.* c. 11; cf. *Adv. Iudaeos de Idol.* c. 19. Similarly, St. Cyprian, *Epist.* 2. 2.

extraneis opinionibus," we can answer the question by a single conclusion: It is permissible for Christians to be soldiers and to make war. This conclusion is frequently affirmed by St. Augustine.[1] He mentions the reply of St. John the Baptist to the soldiers: "Do violence to no man . . . be content with your wages,"[2] and adds that if the Christian doctrine absolutely condemned war, St. John would certainly have told them to throw away their arms and renounce their profession.[3] St. Thomas Aquinas argues to the same effect.[4] It is legitimate to draw the sword against internal offenders and seditious citizens, according to the words of the Apostle: "He [the ruler] is the minister of God, a revenger to execute wrath upon him that doeth evil."[5] He may then also take up arms against external enemies.[6] Again, war is permitted by natural law, "lege naturæ,"[7] *e.g.* the battle of the kings,[8] and by written law, "lege scripta," *e.g.* David and the Maccabeans; and St. Thomas has shown[9] that the "lex Evangelica" does not forbid what natural law allows. There can be no doubt of this in the case of defensive war, for we may repel force by force.[10] And an offensive war is just whose object is to obtain amends for a violation of right, "iniuria accepta"; *e.g.* to punish a nation that has sanctioned a misdeed committed by its subjects, or to restore what has been unjustly taken.[11] If enemies are not punished for their offences, they will become all the bolder for another infraction of our rights, and there will be no peace and security in the State. "Finis belli est pax et securitas republicae."[12] A State would be placed in a very bad position if, when unjustly attacked by enemies, it was permissible only to repel them and not pursue them beyond its territories. If we consider the end and common well-being of humanity, not only could not the world live in peace, but it would be reduced to the worst of conditions if all tyrants, thieves, and robbers could with impunity commit wrongful acts and oppress good and innocent people. Finally, in questions concerning morals a very powerful argument is furnished in the authority and example of good men and saints, who have engaged both in defensive wars to safeguard their country and property, and in offensive wars to pursue and punish enemies

[1] *Contra Faustum*, lib. 22, c. 75; *Lib. Quaest.* 83. q. 31; *De verbis Dom. Serm.* 19; *Serm. de puero centurionis*; *Epist.* 205, *ad Bonif.*

[2] Luke iii. 14. [3] Cf. St. Augustine, *Epist.* 5, *ad Marcell.*

[4] *Summa Theol.* 2. 2. q. 40. art. 1. [5] Rom. xiii. 4.

[6] Cf. Psalm xviii. [7] Relect. vi. p. 227. [8] Gen. xiv.

[9] *Summa*, 1. 2. q. 107. art. ult. [10] *Decretum*, De iust. et iure, Can. vim vi.

[11] St. Augustine, *Sup. Josue*, qu. 16—a passage reproduced in the *Decretum*, can. Dominus, lib. 23, qu. 2.

[12] P. 227. Victoria is here following St. Thomas Aquinas, who says (*Summa*, 2. 2. qu. 40. art. 1): Those who make just wars have peace for their object ("Illi etiam qui iusta bella gerunt, pacem intendunt"). Similarly, the *Decretum Gratianum*, ii. 23. 1, declares that among the true servants of God wars are undertaken not from cruelty or cupidity, but to establish peace, to repress the wicked, and deliver the good. Cf. St. Augustine, who insists that war may be made only through necessity, *Epist.* 205, *ad Bonif.*; *De civ. Dei.* iv. 15; xix. 4, 7, 12.

title under adverse possession, in those systems in which the statutes are completely silent on the subject of adverse possession, is thus a matter of construction of the statutes depending on case law altogether. There are really two distinct questions involved, and each will be clearer if they are kept distinct. One question is: Does the registered title become conclusive against a title already acquired under the Statutes of Limitation before first registration? Another question is: Does the registered title remain conclusive in spite of adverse possession continuing for the full statutory period under Statutes of Limitation subsequently to registration? Now the second of these questions has been disposed of by judicial decision. The Privy Council has decided, in a case from British Honduras, that twenty years' possession commencing after registration is sufficient to extinguish the title of the registered owner,[1] on the ground that the local Statute of Limitations (which formed part of the same code as the Land Titles Registry Act) applied equally to registered and unregistered land. The decision has been held in Alberta to be applicable in systems where the Statute of Limitations is not part of the same code.[2] It should be observed that there was no question in *Belize Estate Co.* v. *Quilter* or in *Harris* v. *Keith* as to any change of ownership whilst the Statute of Limitations was running, so that nothing was said as to a fresh registration giving a fresh start to the running of the statute. The view embodied in the cases cited from British Honduras and Alberta has not, it is believed, been accepted in Queensland, though there seems to be no authoritative decision on the point.[3]

On the question whether the registered title at once obliterates a completed title under adverse possession—and *à fortiori* merely inchoate rights—there appears to be no actual authority. There is nothing in the cases already cited inconsistent with the view that the creation of the registered title is intended to "wipe the slate clean" even of rights—complete or inchoate—under possession. The judgment in *Belize Estate Co.* v. *Quilter* (p. 371 of report), indeed, seems to favour the view that the registered title is, in its inception, conclusive against all such rights, which—it seems to be implied—require time before they can again come into competition with the registered title. There are also some early cases in Victoria that favour this view, it having been considered necessary, under a statute which was silent as to adverse possession, that the registration should be made subject to any such rights in order to prevent the registered owner holding the land free of them.[4] Another consideration in favour of the same view is that in every one of the ten systems the person claiming title by possession either has a certain time—not less than a year in any case—in which to put forward

[1] *Belize Estate Co.* v. *Quilter*, [1897] A.C. 367.

[2] *Harris* v. *Keith*, (1911) 16 W.L.R. 433.

[3] See *Maltby* v. *Pang See*, [1911] S.R.Q. 12.

[4] *Fergie* v. *Byrne*, (1866) 3 W.W. & a'B.L. 56; *Murphy* v. *Michel*, (1867) 4 W.W. & a'B.L. 13.

represents it, and is vested with its authority.[1] Where several States or sovereigns have a common emperor, each may declare war without the latter's consent. Other princes—like the Duke of Alba, whose duchy is part of the kingdom of Castile—may not do so, unless custom has given them this power.[2] Necessity may also confer the like authority, *e.g.* where one town or duke attacks another town or duke, and the king abstains from punishing the assailant.

(3) *What may and what ought to be the causes of a just war?*—In the sixteenth century the question of the justice or injustice of war was usually regarded as one concerning ethics more than international law. In the case of Victoria's "Relectio," it must be remembered that it was addressed to theological students, to those who would one day probably direct the consciences of rulers charged with affairs of peace and war. Throughout his work on the law of war, and especially in this portion of it, he does not lose sight of the relationships between civilised States and barbarians—that is, more particularly, between his own country, Spain, and the Indians of the New World.

Difference of religion cannot be a just ground for war, as has already been shown ("Caussa iusti belli non est diversitas religionis").[3] A people's refusal to accept the Christian faith is no justification for taking possession of its country. This is the opinion, Victoria says, of St. Thomas Aquinas,[4] and of all the doctors. Nor does imperial aggrandisement furnish a just cause ("Non est iusta caussa belli amplificatio imperii").[5] Otherwise it might be a just war on the part of both combatants, so that both would be innocent—which is impossible.[6] The glory of the prince or any other personal advantage to be derived by him is not a legitimate cause for making war.[7] It is his duty to arrange everything for the benefit of the commonwealth; he may not, in his own interests, spend the public revenue, and still less expose his subjects to perils. He has received his authority from the State, and he is bound to use it for the good of the State. Moreover—and here we see in Victoria a precursor of the utilitarian political school—laws are not to be made in view of a private interest, but for the common utility of all the citizens.[8] Hence the laws in virtue of which war is made ought to be established for the utility of all, and not merely for that of the prince.[9]

[1] This is also the view of St. Augustine, *Cont. Faust.* lib. 22, c. 75.

[2] Suarez observes that if subjects of the same kingdom are involved, such custom, however ancient, cannot be admitted; since it would be contrary to natural law to allow peoples having a common superior to carry on hostilities against one another.

[3] P. 231. [4] *Summa*, 2. 2. qu. 46. art. 8. [5] P. 231.

[6] Similarly, St. Augustine condemns the passion of domination, which even vitiates a war that might in other respects have a just cause; he speaks of it as leading to vast brigandage, "grande latrocinium" (*De civ. Dei*, iv. 6; cf. iv. 15).

[7] P. 231: "Nec est iusta caussa belli, aut gloria propria, aut aliud commodum principis."

[8] *Ibid.*: "Leges debent esse nullo privato commodo, sed pro communi utilitate civium conscriptae."

[9] P. 232: "Ergo etiam leges belli debent esse pro communi utilitate et non propria principis."

The only legitimate ground for war is the violation of a right ("Unica est et sola caussa iusta inferendi bellum, iniuria accepta").[1] We may not take up arms against those who do us no injury; to kill inoffensive people is forbidden by natural law ("Adversus eos, qui nobis non nocent, non licet ita gladio uti, cum occidere innocentes prohibitum sit iure naturali").[2] Victoria puts aside the special case where a people is commanded to act by God, who is the master of life and death, and has the right to dispose of all things. War is not justifiable for slight injuries, or minor violations of right; for the amount of punishment should be adjusted to the measure of the offence—and war necessarily involves too heavy a punishment in the case of slight offences ("Non quaelibet et quantavis iniuria sufficit ad bellum inferendum. . . . Non licet pro levibus iniuriis bello persequi authores iniuriarum, qua iuxta mensuram delicti debet esse plagarum modus").[3] Elsewhere, Victoria observes—in a striking passage which reminds us of the arguments of some modern political idealists—that no war can be regarded as just if it is evident that it must bring to the State more evil than good or utility, even though there be just titles to undertake it. The State, indeed, has the power to declare war only to protect itself and its property; therefore, if the projected war is calculated to result in its enfeeblement and diminution of its resources, and not in its prosperity, such war will be illegitimate, whether it is the State or the king who declares it. Moreover, if a war is deemed to be useful to a single State, and is likely to involve great injury to Christendom or to the world at large—by reason of the solidarity of the society of nations—such war will be unjust.[4]

(4) *What may legitimately be done in a just war?*—In general, it is legitimate to do all that is necessary for the public good, since the end of war is the protection and preservation of the State. Hence we may take things of which we have been deprived, or we may take possession of their equivalent; we may take what will compensate us for our war expenditure,

[1] P. 232. So St. Paul, Rom. xiii. 4; St. Augustine; St. Thomas Aquinas, *Summa*, 2. 2. qu. 40. art. 1.

[2] P. 232. Similarly, St. Antoninus, *Summa theol.* iii. 4. 1, says that no just cause can arise, unless there be a commission of an injury or offence, and a refusal to make reparation. Isidore of Seville, *Origin.* lib. 17, c. 1, insists on the "causa propulsandorum hostium," and on the "repetitio rerum"; and this is adopted in the *Decretum*: "Iustum est bellum, quod ex edicto geritur, de rebus repetendis, aut propulsandorum hostium causa."

[3] P. 232.

[4] The original passage is well worth citing (Relect. iii. "De potestate civili," s. 13, p. 112): "Nullum bellum est iustum, si constat geri maiori malo reipublicae, quam bono et utilitate, quantumvis aliunde suppetant tituli, et rationes ad bellum iustum. Probatur, quia si respublica non habet potestatem inferendi bellum, nisi ad tuendum se, resque suas atque se protegendum; ergo ubi ipso bello attenuatur potius atque atteritur, quam augetur, bellum erit iniustum, sive a rege inferatur, sive a republica. Imo cum una respublica sit pars totius orbis, et maxime Christiana provincia pars totius reipublicae, si bellum utile sit uni provinciae, aut reipublicae cum damno orbis aut Christianitatis puto eo ipso bellum esse iniustum."

as well as for the damage suffered. Thus a prince who makes war justly will be like a judge deciding impartially between two litigants. Now, peace and tranquillity are desirable above all other possessions, which, indeed, cannot otherwise be enjoyed. Therefore—like a magistrate who demands security from an internal offender, or takes other indispensable precautions—he may take such additional measures as are necessary to assure this condition; *e.g.* he may raze one of the enemy's citadels, and construct a fort in the enemy's territory; he may, after victory, exact hostages, ships, arms, and all other things that are in good faith considered necessary to make the enemy observe his obligations, and to avoid all danger from him.[1] Further, over and above recapturing what has been seized and taking measures for assuring peace and security, punishment may be inflicted for the violation of right—"licet vindicare iniuriam ab hostibus acceptam, et animadvertere in hostes, et punire illos pro iniuriis illatis."[2] A prince has authority not only over his own subjects, but also over aliens, to the extent of forcing them to abstain from committing injury; for the world, the society of nations, might become a chaos if there were no one to restrain evil-doers. The world can apply such restraint, through the medium of a prince, viz. the particular prince affected. Now it is the part of the prince to defend and preserve not only the property of his subjects, but also the honour and authority of the State.[3] Consequently, it is not sufficient for him merely to defeat the enemy; he must also inflict condign punishment for any affront on the majesty of the State.

(*b*) *Various questions as to the justice of the war.*—From the above considerations various questions and doubtful cases arise with regard to the just character of war.

To render a war just does it suffice that the prince believes his cause to be just? Not always, for it is possible that his judgment may be false or prejudiced, and so capable of being rectified. Hence it must be arrived at in conformity with the opinion of his wise counsellors. Otherwise, a war might be thought equally just by both combatants. It is necessary, then, to examine with great care and impartiality the justice and causes of the war, and to listen to the arguments of the enemy, should he wish to discuss the difference "ex aequo et bono."[4] It is better to settle differences by discussion than by arms; and such discussion should be fair, frank, and dispassionate—for when passion is imported into debate, it is more difficult to discover the truth.

Are the subjects themselves bound to examine the causes of the war, or may they fight without doing so? If they are conscientiously convinced

[1] Pp. 233, 234: "Ex quibus patet, quod parta victoria, et recuperatis rebus, licet ab hostibus exigere obsides, naves, arma, et alia quae sine fraude et dolo necessaria sunt ad retinendum hostes in officio, et vitandum ab illis periculum."

[2] P. 234.

[3] *Ibid.*: "Princeps autem non solum res alias, sed honorem et authoritatem reipublicae defendere tenetur et conservare."

[4] P. 235.

that the war is unjust, they may not fight, even if their prince orders them to do so[1]; for it is illegitimate to put to death guiltless persons, either citizens or aliens, whatever authority may order it—"non licet interficere innocentem quacunque authoritate."[2] When the prince is blameworthy, so are his subjects who agree with him "mala fide."[3] It follows, therefore, that senators, ministers, and all who are admitted to the Council of the State are obliged to determine whether or not there be a valid ground for war. Those who can prevent danger and injury to their neighbours are bound to do so.[4] If, through their negligence, an unjust war be undertaken by the king, they will be deemed to be his accomplices. It does not suffice for the king alone to decide the question. It may be, however, that ordinary subjects need not investigate the causes if they have real confidence in their superiors. But where there are presumptions and indications of the injustice of the war, ignorance alleged by subjects will be no excuse.

What is to be done when the justice of the war is doubtful? In such a case, when one prince is in legitimate possession of property, another cannot make war to recover it; for when doubt exists, the possessor has a prior claim. Otherwise, the war might seem just on both sides, and would never terminate. Where there is a doubt as to the ownership of territory that has no legitimate possessor—*e.g.* when it is not certain who is the true heir on the death of a sovereign—it seems that if one party proposes an arrangement, partition, or compensation, the other is bound to accept the proposal, even if he be the stronger. He who has doubts as to his rights, even when he is enjoying quiet possession, is bound to examine his position with care, and to listen to the arguments of his opponent; otherwise he is not a *bona fide* possessor. If, after due examination, the other's claims are not substantiated, he may remain in possession. When subjects are in doubt as to the justice of a war, they are none the less to follow their prince. He cannot, and ought not, always to render them an account as to the reasons of war; the State might run great risks if they came to fight only after having been assured of its justice. As St. Augustine says, a just man may, in such circumstances, fight, even under a sacrilegious king, if he is certain that what he is commanded to do is not contrary to the law of God, or at least if he is not certain that it is contrary.[5]

Can war be just on both sides at once? Apart from a case of ignorance, this is impossible. If both parties manifestly have equal rights, it is not permitted to make war. In case of invincible ignorance, the war may be just on the side of the party having a valid title, and also on the side of the other if he is free from fault and is of good faith. Invincible ignorance is always

[1] To the same effect observes A. Carletti (d. 1495), *Summa angelica de casibus conscientiae*, s. v. Bellum.

[2] P. 235. [3] Cf. St. Paul, Rom. i. 32; xiv. 23.

[4] P. 236: "Quicunque potest impedire periculum et damna proximorum tenetur."

[5] *Contra Faustum*, lib. 22, c. 75.

an excuse; but in order that ignorance may be invincible, all diligence must first have been brought into the investigation of the truth.[1]

Is a prince who has prosecuted a war, the injustice of which he subsequently discovers, bound to make reparation? As soon as he is convinced of its injustice, he is bound to restore all that he has taken and that still subsists. He need not make reparation for what has already been consumed, as he was acting in good faith at the time of taking it. But those who followed him and were doubtful as to the legitimacy of their proceedings are obliged to restore all.[2]

(*c*) *Permissible acts in warfare.*—Next we have to consider various questions as to what acts are permissible in actual hostilities. In drawing a clear distinction between combatants and non-combatants, Victoria is well in advance of his time, as he is in so many other matters. Thus, in the negotiations between Marshal de Brissac and the Spanish commanders, 1552, to protect peasants from the operations of war, the only precedent appealed to was that of Cyrus, as described by Xenophon.

May we put to death inoffensive non-combatants ("innocentes")? To do so intentionally is wrong, even in war against infidels; for the ground of a just war is a violation of right—"fundamentum iusti belli est iniuria"[3]—and an inoffensive person has not violated any. The inoffensive character of the civil and non-combatant population, including strangers transitory or domiciled, is to be presumed; and such people are not to be attacked, unless they take part in the warfare. However, if injury is done to them accidentally and unavoidably, it is not unlawful, *e.g.* in besieging a town containing "innocent" persons; otherwise, it might not be possible to wage war at all in order to make a just cause triumph. But in any case we must take care that the war does not bring greater evils than those it aims to avoid.[4] Where it is not indispensable to storm a fortified place, containing an enemy garrison and a peaceable population, it does not seem legitimate to use fire, machines, and other means that strike combatants and non-combatants alike. In general it is unlawful to injure the "innocent," when war can be waged and terminated without hurting them. As to the "innocent" who are considered a danger for the future, *e.g.* the children of the Saracens who, when they grow up, may fight against the Christians, or the civil population who may take up arms on a subsequent occasion, it is not permitted to put them to death, for there may be less rigorous means, like captivity and exile, to protect ourselves from them. We may not do an evil even to avoid a greater evil.[5]

[1] Relect. v. "De Indis," ii. 9.

[2] This is also the view of Sylvester, *Summa Sylvestrina*, s. v. Bellum, i. 9; Decretals of Gregory IX. lib. 2, tit. 24, c. 29; St. Antoninus, *Summa theol.* ii. 2. 1.

[3] P. 241.

[4] P. 242: ". . . Oportet cavere, ne ex ipso bello sequantur maiora mala, quam vitentur per ipsum bellum."

[5] P. 243: ". . . Non sunt facienda mala, ut vitentur etiam alia mala maiora."

May the inoffensive citizens be spoiled? We may take from them such things as the enemy may use, *e.g.* arms, machines of war, ships.[1] Otherwise, we could not gain the victory, which is the object of the war. Further, we may take from them money, destroy their corn, kill their horses, provided such acts are really necessary to weaken the enemy. Therefore, in a perpetual war we, if we have justice on our side, may spoil the non-combatant part of the enemy population, since their resources serve to promote an unjust war.[2] On the other hand, if the war can be effectively made without plundering cultivators and other peaceable people, such practice is illegitimate.[3] Sylvester holds that where there has been a just cause to spoil the "innocent," the victor must, at the end of the war, restore to them everything that still exists. Victoria does not think this obligatory, though he recognises that Sylvester's view is defensible and honourable. By the law of war, the interest and the right of those who wage a just war prevail over everything else; so that what they may legitimately take is not necessarily subject to subsequent restitution. But in the case of innocent travellers and strangers found in enemy territory, pillage is not allowable, since they cannot be reckoned as part of the enemy.[4] If the enemy refuse to restore things unjustly taken and the injured party cannot recover them otherwise, he may be authorised by letters of marque to take goods even from the "innocent." But, says Victoria, the practice is fraught with dangers, and may result in lawless pillage.

May we make the civil population prisoners or slaves? We may do so in a perpetual war against pagans, where it is impossible to obtain reparation for violations of right and injuries suffered. Thus it is permitted to lead into captivity the women and children of the Saracens. But there is no such right in war between Christian nations. Should necessity demand, however, women and children may be taken prisoners, for the purpose of ransom and not slavery. Care must be exercised not to stretch this practice beyond what necessity strictly demands, and to observe in its application the laws and customs of war.[5]

Is it lawful to put to death hostages? Yes, if the enemy breaks his promise and does not conform to the convention made with him, provided the hostages form part of the combatants; but not so, if they are non-combatant citizens.

Is it permitted in a just war to put to death all combatants? In action we may indifferently kill all who fight against us, so long as there is danger to

[1] P. 243: "Certum est quod licet spoliare innocentes bonis et rebus, quibus hostes adversum nos usuri sunt, ut armis, navibus, machinis."

[2] *Ibid.*: ". . . Ex opibus suorum hostes alunt bellum iniustum."

[3] So also Sylvester, *Summa Sylv.*, s. v. Bellum, 1. 10.

[4] P. 244: "Spoliare . . . peregrinos et hospites, qui sunt apud hostes nisi constet de culpa illorum, nullo modo licet, quia illi non sunt de numero hostium."

[5] "Quod tamen extendendum non est ultra quam belli necessitas postulet, et consuetudo legitime belligerantium obtinuit," p. 245.

fear from them. After victory, it may be necessary also to put to death some of the defeated combatants, because the end of war is not merely to regain what has been taken from us, but also to punish violations of right, and, through fear, to assure security for the future. For reasons of punishment alone it is not always legitimate to put them to the sword; we must fix the penalty without any cruel feeling, and according to the dictates of equity and humanity. But in a war with infidels, if it is impossible to assure security save by destroying all combatants able to bear arms, then this extreme measure may be taken. This may never be done against a Christian nation; otherwise, civilisation and Christianity might be destroyed altogether, and the world would be made a desert. Such wars would then have for their object not public good but universal misfortune.

Strictly speaking, there is nothing to prevent the captor from putting to death those combatants who have been taken prisoners, or who have surrendered. But by established customs and usages of war, it seems that when the victory has been gained and danger averted, they ought not to be put to death, if they do not try to escape.[1] In the case of a place that capitulates, there may be special stipulations. Otherwise, when a fortified place capitulates unconditionally, it is within the power of the prince or magistrate to condemn to death some of the leaders.

Does everything taken from the enemy become the captor's property? As the object of the war is to obtain satisfaction, we may appropriate what will suffice to cover the value of the things taken from us, together with the war expenditure, and the amount of injury suffered. The latter must be estimated in accordance with the dictates of equity, to which a "good man" would pay heed. To pillage a town is not in itself prohibited, if it is necessary to make war, to terrify the enemy, or stimulate the courage of our soldiers. A town may also be burnt down for a reasonable cause. But if necessity does not absolutely demand it, it is wrong to commit acts of cruelty and savagery.[2] In any case none of these things may be done without the authorisation of the sovereign; for soldiers are not judges, but executors of his judgment. The question of immovables is more difficult. If the enemy has destroyed our citadel, town, or forest, etc., we may take possession of the like belonging to him, and keep it as long as is necessary, by way of reparation. To assure security we may, apart from this, take a citadel or town and keep it for defensive purposes. Further, as a penalty for violating our rights, we may cause the enemy to cede a part of his territory. If necessity or military operations compel us to invade the greater part of the enemy territory and occupy several towns, we must, on the conclusion of peace, restore everything,

[1] P. 247: ". . . Quia in bello multa iure gentium constituta sunt, videtur receptum consuetudine et usu belli, ut captivi parta victoria (nisi forte sunt profugae) et periculo transeunte, non interficiantur, et servandum est ius gentium eo modo quo inter bonos viros servari consuetum est."

[2] Similarly writes Cajetan (1469—1534), *Summula*, s. v. Bellum.

except that which we are justified to retain by way of compensation for injury and expenditure, and as a punishment for the violation of our rights. But we must proceed throughout with moderation; we must act conformably to equity and humanity; the penalty must be proportioned to the gravity of the offence—"poena debet esse proportionata culpae."[1]

A tribute may also be imposed as compensation, and as a penalty.

Finally, are we entitled to depose the enemy's prince, and set up a new one, or take the country for ourselves? This is not to be done indiscriminately. Both human and natural law require proportion and moderation. The offence of the enemy may well furnish a just cause of war, and yet not sufficient grounds for deposing the prince or suppressing the country's independence. Sometimes, however, this may be done from some urgent reason, *e.g.*, owing to the multitude and atrocity of the enemy's offences, and especially the necessity to assure peace and safety which we could not otherwise procure.

From what precedes, three canons or rules of war may be formulated:

(1) Assuming that the prince possesses sufficient authority to make war, he must take care not to seek occasions and reasons for declaring war; he should, rather, endeavour to live at peace with all the world. He should remember that other men are our neighbours, whom we ought to love as ourselves; that we all have the same God before whose tribunal we shall have to render an account for our conduct. It is indeed the highest form of cruelty to seek reasons for destroying men whom God has created, and for whom Christ died.

(2) When, for a just cause, war has been declared, we should wage it not to ruin the nation we fight against, but to vindicate our right and defend our home and country, with the view that, through the war, peace and security will be more firmly established.

(3) When war is terminated, the victor must use his success with Christian moderation. He should regard himself as a judge deciding between two States, of which one has violated the rights of the other; as a judge and not as an accuser should he pronounce sentence, which is to make reparation to the injured State. But after having inflicted due punishment he must endeavour to reduce as much as possible the disaster and the misfortune of the offending State, especially so as among Christian nations the fault usually lies with princes themselves rather than with their peoples.[2]

Conclusion.—We must constantly bear in mind that Victoria lived and taught in the age of the Reformation, when there was scarcely any legal sanction to prevent monarchs and warriors from giving full play to their power and ambition. The strong arm was the law; the powerful commanded, the weak had to submit on pain of being mercilessly crushed. To refrain from committing the most rigorous, the most dreadful acts in the conduct of belligerent operations—even when they were not indispensable to military plans—was regarded as an extraordinary concession to the claims of humanity.

[1] P. 250, s. 56. [2] Pp. 251, 252, s. 60.

and not as an obligation due to the adversary and to the public opinion of the civilised world. The work of men like Victoria gives admirable expression to the most enlightened juridical consciousness of the age,—the consciousness that States, when they make war no less than when they are at peace, are necessarily subject to some inevitable rules and principles, which, though always possessing intrinsic validity, are also sometimes fortified and emphasised by explicit undertakings. Victoria's doctrines are of a remarkably progressive character. In many respects they are far in advance of the best practice and prevailing conceptions of the time. They are consistently based on considerations of humanity, and are held by him to possess universal applicability. His modest, unassuming production, "De iure belli," which is admirably concise, logically arranged, and clearly expressed, comprises, not a few isolated criticisms and conclusions, but a systematic account, founded on first principles, of a good portion of the law of war. Throughout his treatment we recognise a modern tone and spirit, animated by a rare impartiality, judicial balance, and independence of mind. He is a loyal Spaniard, but he decides without fear against many of the claims of his monarch and his countrymen. He is a faithful Dominican, but without hesitation he sets a limit to the claims of the Papacy, and indicates its legitimate jurisdiction. He is an erudite theologian, and thinks that the sphere of international law is by no means a foreign one to a theologian, but he none the less substantially laicises the law of nations. He is a past master in the handling of cases of conscience, but he eschews and condemns the casuistic subtleties of unscrupulous opportunists and special pleaders. He denies that there is one law for Christian States and a different one for infidel communities or uncivilised peoples. He insists on the essential and inevitable solidarity of the entire society of nations, and therefore also on the interdependence of States, and on the principle of intervention. He points out that sovereigns must rule, and conduct international relationships, for the benefit of their people, and not for their own private aims and ambitions; and holds that individual conscience is not always to be suppressed by public conscience. He maintains that unconscionable treaties extorted by superior force are not legally binding. He condemns the practice of reprisals, when adopted irregularly and indiscriminately. He denounces those who are ever ready to seek causes and occasions for war; he shows that it is illegitimate to declare it without perfectly just grounds, that, when begun, it must be prosecuted with strict moderation, that a clear distinction is to be made between combatants and non-combatants, that no act whatever should be done from mere vengeance, and that all belligerent operations should be carried out only to the extent demanded by the imperious necessity of self-defence and general security. By his cogent, coherent, scientific presentation of vital questions like these and many others of permanent interest and importance, Victoria shows himself to be an invaluable precursor of Grotius and an able builder of international law.

WOMEN'S WORK IN THE COURTS IN THE UNITED STATES.[1]

[*Contributed by* Miss G. Hopkins (Mrs. Herbert Musgrave).]

It has been found expedient to make some concerted effort to minimise the evils that exist in all great cities, and for eight years New York has been bringing to a high point of perfection a Court devoted exclusively to the cases of girls and women.

This Court sits both day and night, and though New York compares in size to London *all cases* of minor offences of girls and women (soliciting, petty larceny, etc.) are brought before it. The magistrates are assisted in their work by women probationer officers. Women found guilty are registered by the Bertillon system of finger prints, in a room adjoining the Court. Thus a change of magistrates does not affect an individual record, for it takes but a moment to verify any doubt as to identity, and the punishment for repeated misdemeanours at all times meets the crime.

It will at once be seen that, from the economic standpoint, this single Court is of immense value, as it does away with the expense to the city of repeated rearrests of one person in many districts, and also with the question of fines.

In Philadelphia a beginning is just being made, so that an outline of the steps that have been taken and what they have accomplished will prove that much may be done pending legislation. Philadelphia is still in the iron grip of boss rule, or machine politics, so that it has been as much or even more handicapped than New York by the political conditions.

Unlike New York, the magistrates with two exceptions are not members of the Bar. There are forty-seven districts in Philadelphia and fifteen magistrates.

The night Court was started in the Central Station about three years ago. The conditions will be realised best, perhaps, if I describe the scene as I became familiar with it. Instead of the quiet and dignified tribunal we had hoped to see, we were admitted to a room packed with sensation seekers, clouded with smoke, with no semblance of law or order. There was no woman in Court to whom a woman in distress or illness could turn. We stayed till 5.30 in the morning and three cases on that first night came to us

[1] Notes of an address delivered to the New Constitutional Society for Women's Suffrage.

by natural gravitation, if I may so express it. One was a woman accused of losing a child through carelessness. Here it chanced that my friend had known her as an industrious, hardworking member of society, so bail was forthcoming and she was allowed to return that night to her seven other children under ten years of age. The second was a runaway girl of whom we took charge, and the third an alien vagrant who spoke no English and who was pregnant. We were also allowed to dispose of her case.

For six weeks two of us took alternate weeks of this work, watching and learning, and helping where we could, though unable to forget that parallel cases were being heard all over the city, with only men in the Court.

At the end of this time the work had become so heavy that we could not carry it on, and we looked about for a trained agent to organise it on professional lines. The results of the volunteer work had proved the great need of it, and money, from private sources, was forthcoming for salaries.

We found a woman of rare parts to do this, and to Miss Gillette is due the entire credit of the results. She had to meet protests from all sides, political antagonism, ignorance and indifference to what was being tried, and it is due to her training, tact, energy, force, and sympathy that Philadelphia stands where it does to-day. She proved so clearly to the magistrates and to the general unheeding public the need of the work, that, backed by a strong Committee, after much readjustment, but with no legislation, almost all women's cases were brought to Central Station. The two members of the bar were detailed to that Court and order prevailed.

Miss Gillette has now a staff of ten assistants. Agents are in Court at every hearing, and at the direction of the magistrates take the girls of whom nothing is known to Cuthbert House on remand. This saves first offenders from being sent to prison. We have not yet introduced the Bertillon system.

The house is run primarily in connection with the Courts, but is available to the Police and Detective Bureaus, to shopowners (who have found a girl shop-lifting and are willing to save her from arrest), or to any of the city, state, or national agencies. Parents often bring a girl who is becoming unmanageable. All cases sent to the house from whatever source are mentally and physically examined, and the Court cases are held over until all facts concerning them are ready to lay before the magistrate, with a recommendation as to disposal.

This investigation brings to light the truth of the stories told. Relatives or friends are communicated with and, needless to say, there are many women and girls who are in great trouble and urgent need. There are also many who are undeserving.

Between 80 and 90 per cent. of these cases are found to be sub-normal, that is, unfitted to help or protect themselves, a fair proportion are insane, many epileptic, etc., almost all diseased. By acting as a clearing house and sending them to the institutions that will care for them, the community is relieved not only of these individuals, but of the future support of unborn

incompetents, and much is accomplished in preventing or controlling the spread of disease.

Work is found for those willing or capable of working and progress is followed and recorded. For old offenders the State of New York provides the Bedford Reformatory. A woman may be committed here for a short term or for as long as ten years. As the Reformatory is in the country she has much out-of-door work in connection with kitchen gardens, care of cows, etc., and is also taught a trade.

It may be added that transient as the girls are in Cuthbert House, it has been found practical to make it self-governing, that is, to have one of the girls judge of a Court held twice a week for misdemeanours or breaches of discipline, bad language, etc., throughout the house during the day. It is amazing to see how well this is done. An almost perfect discipline is upheld in this way. The Superintendent is the Supreme Court or ultimate authority in case of complications. The girls do the whole work of the house, and have sewing, reading, singing, dancing, etc., by way of entertainment, or reward for good behaviour.

The Court of Domestic Relations.—In Philadelphia cases of desertion had for years come under the Quarter Sessions Courts, but owing to the fact that the Courts were overcrowded, had been pushed to the wall, having only one day a week set aside in which to hear them. The judges in the main were not interested and hurried through the unwelcome day as fast as possible. In summer there was six weeks' vacation when only prison cases were heard, and I have known of women whose minds gave way under the long strain while waiting to get their cases to Court. I have heard 110 such cases disposed of in 136 minutes. Needless to say that this was an unintentional travesty on justice, owing to the enormous bulk of work that had to be got through.

In January 1914 a Bill passed the legislature creating a Municipal Court, and it has proved one of the largest factors for permanent reform that the city has ever known. This Court draws the extra work from Quarter Sessions and is divided into five branches—Domestic Relations, Juvenile, Petty Criminal, Petty Civil, and the Court of Morals which has not yet gone into effect. When it does it will take the work already spoken of from the police stations, also the cases of support of illegitimate children, panderers, etc., dove-tailing of course with the work of the other branches.

A Probation Department has been instituted in connection with the Court of Domestic Relations and *no* summons or warrant for desertion or non-support can be issued anywhere in the city before the case has been passed on by this office. The method of procedure is this: A woman makes her complaint, non-support, desertion, drunkenness, abuse, *to a woman*, and a letter is sent asking the man to come in. It is almost an unknown thing to have the man refuse to come, for he welcomes the opportunity of keeping the case out of court. A careful record is kept of the first and all subsequent interviews. If any doubt arises, after having seen the man, as to the truth of

the statement from either side, a Probation Officer is sent to make further investigation; a man to the man, a woman to the woman. These findings are added to the report, and if no adjustment seems possible an order for a summons is given to the applicant.

When the case comes to court the report of the Department is laid before the judge, and the Special Agent or Probation Officer in Chief is in court should he wish to ask further questions. If further investigation is found necessary the case is turned back to the Special Agent, who again takes it up with the probation officer. Needless to say a very high type of trained worker only is employed in this capacity, for we feel that so much depends on him (or her) as to whether the family is to be held together. Should a separation be granted and an order for support made, the man is told to send or bring the money to an office connected with the Court. From there it is sent out to the wife. If the money is not regularly paid the probation officer goes to find the man and see what accounts for the delay. Should it become necessary to send the man to the paid workhouse, he is paid $3·65 a week for his work, most of which is sent to his wife.

Desertion has been made a felony in Pennsylvania and a man may be extradited from any part of the country. It has been proved cheaper to do this than for the community to support the family.

The type of cases coming before the Probation Department may be roughly divided as follows:

1. The very young. A case in point recalls itself to my mind of a girl fifteen and a boy seventeen. He does not earn as much as she thinks that he should, and urged by ill-advised friends she taunts him with it. He finally loses patience and goes to Baltimore. She comes to the Department for a warrant. In this case only a short correspondence was needed. It ended with a letter to the wife, sent in the Special Agent's care, which read: "Everything O.K. Coming as fast as I can. Yours to be, Eddie."

2. The man who drinks. A hard-working self-respecting wife with six little children, after telling her story, laid on my desk three black-jacks and two steel knuckle-dusters, stolen from her husband when he was drunk to protect herself and her children. This case came to Court, and the man was sent to the workhouse for six months and to a nerve specialist on coming out. He has been practically cured.

3. The man who dreaded being sent to prison, so that it had become a monomania. Any knock on the door sent him flying to the cellar for refuge. He was incapable of work, because he was in arrears on an old order. The Probation Officer reassured him, and the wife forgave the arrears. He is now on his feet again.

There is also the nagging or immoral woman. The right is very often entirely on the man's side.

Perhaps the most pitiful of all cases are the very old people, who come to the office seeking support from their children. These cases very rarely come

into court, as it is usually a matter of adjustment as to the wages, etc., of the different members of the family.

In Philadelphia the four Courts—Petty Criminal, Juvenile, Domestic Relations, and what will soon be known as a Court of Morals—co-operate closely, and are in daily touch with each other through a Central Registration Bureau. Any new case coming before a Court is registered and the name sent to the other branches. Records in each Court, very full and carefully kept, may apply to the several members of one family. The Bureau also registers and exchanges information with the city's charitable agencies. In this way, if it is needed, the history of a family or an individual may be known in a few moments. The Bureau is, of course, most careful to whom such information is given.

To sum up this work. We have found that the best class of woman will suffer almost anything rather than make a complaint to a man, or come into open Court, and we have found that in one year there have been 15,300 such cases needing care and attention. Of this number 12,192 were settled or disposed of without being brought to Court.

When one realises that at a low average of two children to each family the decisions of this Court affect roughly 70,000 people in the community each year, it will be seen that the importance of the work can hardly be over-estimated.

BRITISH AND FOREIGN PHARMACOPŒIAS.

[*Contributed by* H. Wippell Gadd, Esq.]

Pharmacopœias are no mere modern innovation. They have been essential to the proper practice of medicine ever since it emerged from an individualistic practice of mystery to a more or less organised scientific calling. When the medicine man grew his own herbal remedies or compounded his medicines in a dim alchemic workshop, there was no occasion or desire for a published book on physic, still less for a compendium of formulæ, but as soon as the functions of diagnosis and prescribing became separated from those of compounding and dispensing, it was necessary that there should be a standard work of reference available to physicians and prescribers on the one hand, and their allies, the apothecaries, dispensers, or pharmacists on the other, so that their complementary functions might be performed in harmony. Time was when local formulæ, expressed sometimes in local scales of weights and measures, sufficed, but the increase in travelling and in general facilities for intercourse have long since necessitated national, if they have not yet required international, Pharmacopœias.

Early Editions of Pharmacopœias.—In this country the first definite attempt to provide a regular standard for medicines seems to have been made by the College of Physicians, which, in 1618, published a Pharmacopœia in Latin, of which some twelve editions were brought out at irregular intervals during the seventeenth, eighteenth, and the first half of the nineteenth centuries. For at least one of these editions experiments were conducted in the laboratories of the Apothecaries Company—a committee of that body having been called to the assistance of a Committee of the Fellows of the College of Physicians.

In Scotland the first Edinburgh Pharmacopœia was published in 1689, and between that date and 1840, when the last edition was issued, there were fourteen others.

In Ireland it was not till 1794 that a Dublin Pharmacopœia was published, and then only tentatively, and it seems that the only local Pharmacopœias actually used in Ireland were those published in Dublin in the years 1807, 1826, and 1851 respectively.

Publication by General Medical Council.—By the Medical Act of 1858[1] the duty was cast upon the General Medical Council of publishing a book to be called the "British Pharmacopœia," but this Act did not make such book binding on any person or body of persons.

By the Medical Act of 1862, exclusive rights were given to the General

[1] 21 & 22 Vict. c. 9.

Medical Council of publishing, printing, and selling the British Pharmacopœia, and any Act of Parliament, Order-in-Council, or custom relating up to that time to the London, Edinburgh, and Dublin Pharmacopœias respectively was to be deemed to refer to the Pharmacopœia published by the General Medical Council.

The purpose for which the British Pharmacopœia is published is succinctly stated in the preface thereto in the following words: "It is intended to afford to the members of the Medical Profession and those engaged in the preparation of medicine throughout the British Empire one uniform standard and guide whereby the nature and composition of substances to be used in medicine may be ascertained and determined." This purpose is a more restricted one than that for which most foreign Pharmacopœias are compiled, as the latter usually include a number of regulations to be observed by pharmacists, of which one is that a pharmacist may not dispense more than the official dose of any toxic drug, unless the prescriber has authorised an unusual amount by a distinctive sign on the prescription.

In the preface to the new British Pharmacopœia[1] it is stated that "where an unusually large dose appears to be prescribed, it is the duty of the pharmacist or dispenser to satisfy himself that the prescriber's intention has been correctly interpreted," but this is a mere *obiter dictum* of the General Medical Council, which has no disciplinary powers over pharmacists or dispensers.

Foreign Pharmacopœias usually give lists of preparations which may be only sold in pharmacies (a matter which in this country is dealt with by the Pharmacy Acts), and the Italian Pharmacopœia contains the approximate formulæ of all proprietary medicines which are allowed to be sold.

Maintenance of Standards in Pharmacy.—Some further authority is given to the British Pharmacopœia by s. 15 of the Pharmacy Act, 1868, by which a penalty is provided against, *inter alios*, any person who should compound any medicines of the British Pharmacopœia except according to the formularies of the said Pharmacopœia.

Compounding being a distinct operation from selling, and one which it is almost impossible to control by external authority, this provision is practically a dead letter, and there is no recorded instance of any action under it. The enforcement of the standards set up by the British Pharmacopœ by penal proceedings has only been effected by means of Acts in which there is no reference to it, that is, the Sale of Food and Drugs Acts.

Under these Acts there have been several leading cases,[2] of which the general effect is that when a compounded medicine is demanded by a name

[1] Published in 1914 by Constable & Co., London, 10s. 6*d*. net.

[2] *White* v. *Bywater*, L.R. 1887, 19 Q.B.D. 582; *Dickens* v. *Randerson*, L.R. 1901, K.B. 347; *Boots Cash Chemists* (*Southern*) *Ltd.* v. *Cowling*, 1903, 67 J.P. 195; *Hudson* v. *Bridge*, 1903, 67 J.P. 186; and *Fowle* v. *Fowle*, 1896, 75 L.T. 514).

which occurs in the Pharmacopœia, an article made in accordance with the formula and answering the tests, if any, of the Pharmacopœia, is presumed to be required, and that only very strong evidence to the contrary will suffice to rebut such presumption. It should be noted, however, that all these cases deal with purely commercial transactions, that is to say, with the sale by simple contract of medicinal preparations. None of them has to do with the dispensing of physicians' prescriptions, a transaction which, although often including a sale, differs essentially from a simple sale.

The Liability of the Dispenser.—Little attention has been given to the question of the legal relations between a dispenser who keeps "open shop" (to use a phrase of the Pharmacy Acts) and the person who presents to him a physician's prescription with a request that it may be dispensed, and these may be usefully discussed in the present connection.

The owner of the prescription, which is a technical document understood fully only by trained experts, is presumably ignorant of what has been prescribed for him. No question therefore arises of anything being supplied of the nature, quality, and substance demanded by the purchaser, but a contract is tacitly made between the parties to the effect that the pharmacist will translate the prescription and make up the medicine in accordance with what appears to him in the light of his technical training and experience to be the intention of the prescriber.

But the intention of the prescriber is not always clear for the reason that medicines with names well known to the medical profession may and do have their composition and strength materially altered in successive editions of the Pharmacopœia, and each issue of the British Pharmacopœia becomes authoritative coincidentally with its publication. A busy professional man, such as the average general medical practitioner, cannot always be expected at once to be cognisant of, still less to have assimilated, sudden changes in the tools with which he has worked during perhaps the whole of his active career, and it follows therefore that a prescriber may be thinking of an obsolete strength and dose when specifying a certain medicinal preparation, and may order it in inappropriate and even dangerous quantities. The dispenser is not therefore necessarily or always bound to make up a prescription with ingredients compounded in accordance with the formulæ and answering the tests and conforming to the standards of the current Pharmacopœia. If he do so, he may conceivably lay himself open to an action for negligence for not exercising such skill and knowledge as would be presumed to be that of an ordinary and average practitioner of his calling. In extreme cases, the negligence might be such as to incur criminal liability, and to justify a prosecution on a charge of manslaughter, although there might, and doubtless would be, contributory negligence on the part of the prescriber for which he might also have to answer.

Date of Publication.—In some of the British Dominions, where by law or custom the British Pharmacopœia is recognised as the standard for medicines,

steps have been taken to mitigate this danger; thus at a meeting of the Medical and Pharmacy Council of the Orange Free State held in December last, a letter from the Cape of Good Hope Pharmacy Board, with regard to the new British Pharmacopœia having been read, it was agreed that the Government should be advised to make July 1, 1915, the date when the Pharmacopœia should come into force, instead of January 1 as in this country.

In the United States of America, the only civilised country wherein the Pharmacopœia is produced by a private association without any official authority from the central government, although the book when published is a legal standard under the Food and Drugs Acts, different dates, separated by some months, are fixed for the publication and coming into force of the Pharmacopœia.

Compiling Authority.—We have already noted that the compounding and dispensing of medicines has largely been given up by medical men, who by reason of the demands on their time are not usually able to familiarise themselves with the technical details connected with the evaluation and preparation for use of drugs. It is therefore the more curious that the sole responsibility for the production of the Pharmacopœia rests, in this country, with a Committee appointed by the General Medical Council.

It is true that there is also a Committee of Reference in Pharmacy nominated by the Pharmaceutical Society of Great Britain and the Pharmaceutical Society of Ireland, and that the Professor of Pharmaceutics of the Pharmaceutical Society is the joint editor of the new edition of the Pharmacopœia, but the final decisions in every case rest with the Pharmacopœia Committee of the General Medical Council.

At the International Congress of Pharmacy at Brussels it was stated that Great Britain appeared to be the only civilised country in which the national Pharmacopœia was produced by a Commission from which pharmacists were excluded.

The procedure in other countries is briefly as follows:

In Italy, the Pharmacopœia is produced by a Commission composed of one Professor of Chemistry and one of Pharmacology.

In Spain, the work of producing the Pharmacopœia is entrusted by the Government to the Royal Academy of Medicine at Madrid, which appoints a Committee of eight of its members, half of whom are physicians and the other half pharmacists.

In most other countries the Pharmacopœia is issued under Government supervision, generally this work falling within the scope of the State Board of Health.

In France, the Committee is formed under the approval of the Minister of Public Instruction.

In Germany, as might have been expected, the whole matter is dealt with with great exactness.

In connection with the Imperial Board of Health, a Standing Commission is appointed, whose duty it is to prepare periodically necessary corrections and additions to the Pharmacopœia.

To this end the Commission has to collect, sift and test material, and to submit, at intervals of about two years, its definitely formulated proposals for the correction and supplementing of the Pharmacopœia to the Imperial Chancellor for further consideration. The Chairman of the Commission is a Director of the Board of Health, and the office work is done at the Board of Health.

The Commission consists, in addition to the Chairman, of those extra-ordinary members of the Health Board who occupy a position of supreme medical administration of a Federal State, and of further members who are appointed by the Imperial Chancellor. The expenses incurred are borne by the Board of Health.

In pursuance of the above scheme, the Imperial Chancellor appointed twelve representatives of clinical and practical medicine, pharmacology, pharmacognosy, and applied chemistry and pharmacy to be members of the Standing Commission.

The number of members was increaeed in 1892 to fifteen and in 1897 to eighteen, representatives of the wholesale pharmaceutical industry and of veterinary science being included in the Commission. By an order of March 9, 1891, 'in addition to the Pharmaceutical Committee, there was appointed a Medical Committee for the determination of medical questions.

Proposed Reform.—In Great Britain there is no proper provision for laboratory experimental work in connection with the production of the Pharmacopœia, and for this and other reasons the book is far behind medical practice, as it does not include a great many of the drugs and preparations in common use for which there are consequently no authoritative standards; whilst it still contains many drugs which are practically obsolete, if they have not been definitely proved to be useless.

Fresh legislation is needed to bring the production of the Pharmacopœia into accordance with the methods obtaining in most civilised countries, and it would seem that this should preferably be on the lines of establishing a statutory Commission to deal with this work alone.

The said Commission should have upon it representatives of the medical and pharmaceutical professions, including medical men and pharmacists having had experience of practice in India and in the various British Colonies.

Further, analytical science and practice should be represented on the Commission, and, as a reconciling element, the Chairmanship might well be entrusted to a barrister-at-law of some standing.

The whole question is intimately connected with that of the regulation of the traffic in proprietary medicines,[1] which awaits consideration when circumstances are favourable.

[1] Briefly discussed in the January issue of this Journal, vol. xv. pp. 62-4.

THE JUBILEE OF THE LAW REPORTS.

1865—1915.

[*Contributed by* JOSIAH ODDY, ESQ.]

Proposals for Authorised Reports.—The celebration of the Jubilee of the Law Reports would certainly have gladdened the heart of their initiator, Daniel, and the band of legal brethren who combined to give effect to the idea of regular authorised Law Reports. Looking back over the half-century which the rows of Law Reports span we but dimly realise the labour involved in securing unanimity among the profession for the publication of the Law Reports. As early as the 'forties a society had mooted the question of State-aided Reports, but Lord Chancellor Westbury compared the society to the Waggoner of mythology appealing to Jupiter to help him out of the ruts. The Lord Chancellor refused to be moved. Reporting is a privilege of the Bar, he said, and the Bar must devise whatever remedy is required. Through the 'fifties Serjeant Pulling made nobler efforts to the same end, but without success. In the early 'sixties Mr. Daniel circularised the profession and enlisted the sympathy of Roundell Palmer, then Attorney-General.

Meetings were held in Lincoln's Inn Hall, attended by 700 or 800 members of the profession; the *Times*, *Daily Telegraph*, and *Daily News* devoted leaders to the question, and the proposal for starting the new series of reports was adopted.

Lord Lindley, then Mr. Nathaniel Lindley, was not the least helpful supporter of Mr. Daniel's project. He prepared a valuable memorandum setting out the principles which ought to be followed if the Reports were to attain their object. They should state the parties, the nature of the pleadings, essential facts, points contended for by counsel, grounds on which judgment was based, judgment, decree, or order actually pronounced.

Mr. Amphlett and Sir Fitzroy Kelly, afterwards Lord Chief Baron, also lent valuable aid. But the vested interests in the shape of reporters and the trade did not like the project. In those days it was not uncommon for any barrister to make a compact with a publisher and bring out a fresh set of reports. Some were profitable. Over 5,600 copies of the tenth volume of Barnewall and Cresswell, according to the publishers' books, were actually sold. A volume was worth £2,000 a year to the reporters. Reporters were said to receive £40 a sheet of sixteen pages.

At the date of the inception of the Law Reports there were fourteen sets of authorised reports, not to mention the unauthorised and irregular reports.

A practising barrister was lucky if he escaped with less than £50 a year spent on reports. Yet the overlapping was considerable, and led to endless confusion in the citation of reports. The burden of case law had grown too heavy to bear.

Yet the reporters had to be placated. Apparently the idea of free trade in reporting was rampant—the idea that any barrister could take his seat in any court and commence a set of reports. In practice, however, reporters attached themselves to certain courts and became recognised by the judges, and when the time came for organic change they were found to be under the patronage and protection of the judges, and had in effect to be bought out.

Plans for the Law Reports.—One of the first steps, therefore, in the new scheme was to secure the services of the authorised reporters. Offers were made to them. Some were willing, provided their salaries were guaranteed for a period of years. Mr. Hurlstone refused for himself and Mr. Coltman, though it was understood Mr. Coltman was willing. Mr. Best refused for himself and Mr. Smith, though Mr. Smith was willing. Mr. Hemming consented. The reporters were doubtful of the success of the new venture. They pleaded that they were asked to exchange a certainty for an uncertainty.

The matter was put to the Lord Chancellor—Cottenham. A guarantee fund was started and guarantees were obtained of £30 and upwards, and the reporters took their places in Court on November 2, 1865.

Meantime the trade had been busy protesting. Messrs. Butterworth called upon Mr. Daniel and urged that the Bar scheme if it succeeded would be an unfair interference with the vested interests of law publishers and to be deprecated on that ground. But, he added, its success was very uncertain, and if it failed it would be unpleasant to consider the consequences. He could only regard it as an extremely hazardous speculation at the best. Mr. Daniel was undisturbed. But the trade persisted and framed a memorial to Sir Fitzroy Kelly and the Council on behalf of the law publishers setting forth their grievances.

Financial Support.—An attempt had been made through Mr. Sweet to win over the trade, but it failed. Mr. Daniel then consulted Mr. Clowes, who, a year or so before, had offered his services as printer. Mr. Clowes was willing to make up the guaranteed subscriptions to £10,000, so that the Council might be free to proceed. But the trade was active. The judges had kept aloof from the venture. The trade said that it was because they did not approve. It became necessary to denounce this insidious suggestion, and this was effectively done at a meeting of the Council. The Council anticipated and obtained 4,000 subscriptions at £5 5*s.* each. Financially the venture was successful from the beginning. There was never any need to call on the guarantors. Thirteen sets of authorised reports ceased when the Law Reports started. Those of Best and Smith remained. The short-lived New Reports were abandoned in 1866 and the *Jurist* in 1867. In a

short time the Law Reports were supplemented by Weekly Notes and the Statutes, and the price reduced to £4 4*s*. Digests also began to be issued. The result was a greatly increased sale at home and a growing demand from overseas. The mail orders became a valuable asset.

Apparently this very success proved a source of grievance and a ground of attack. Other reports had continued their course, notably the Law Journal Reports and Law Times Reports, supplemented with Weekly Notes of Cases. And in 1884 the Times Law Reports appeared, the value of which was that reports were published weekly.

The Reports.—Whether the Law Reports had grown belated or ignored cases that the profession thought important or scamped work is not clear. But during the 'eighties and early 'nineties there was some dissatisfaction. Several publishers combined in a new venture, assisted by Mr. John Mews, to start what became known as "The Reports." Sir Frederick Pollock was induced to accept the editorship, and obtained the co-operation of Maitland and a strong council. "The Reports" appeared in 1894. The Editor's prefatory note to the first volume is instructive. After apologising for the title, lest it might be confounded with Coke's Reports, he says that the Incorporated Council of Law Reporting were unlikely to pay much heed to criticisms or suggestions. What those criticisms or suggestions were and whether well-founded or ill-founded does not appear. He proceeds to suggest that the Council of Law Reporting thought that they had accomplished the ideal defined years before by Lord Lindley because they had achieved financial success. The Reports he was about to edit were "a private venture, but such as to satisfy all the legitimate wants of all branches of the profession." And no doubt they did, but unfortunately they soon came to an end. And why? The Reports were excellent. Probably the trade thought that the profession would subscribe to a second set of reports. It was an attempt to get back into the old rut, out of which Serjeant Pulling, Jupiter failing, had dragged the waggon in the 'fifties. Out of the seeming failure a new era began for the Law Reports. Sir Frederick Pollock was induced to transfer his services from the new venture to the old. The voice of criticism was stilled. Whether all that he desired and hoped in The Reports became embodied in the Law Reports from 1895 onwards it were difficult to say.

Multiplicity of Reported Cases.—As the jubilee of the Law Reports approaches the trade has again become active—not so much against the Law Reports as in competition with one another, though involving the Law Reports. Gigantic schemes of republication and digesting are afoot. For some few years the trade has been busy feeling the pulse of the profession. The rapid increase in the number and volume of reported decisions began to engage the attention of the American Bar Association as early as 1898, and was under discussion for several years. It was felt equally in this country and has continued to be felt. A recently created Lord Justice of Appeal

protested soon after his elevation that the multitudinous reports of cases made the task of the Judges infinitely difficult and laborious. This may be a reflection on reporters for not discriminating between what ought to be reported and what rejected. Lord Lindley laid down certain guiding principles for reporters in his famous memorandum in 1865. Briefly they were :

Exclude : (1) Those cases which pass without discussion or consideration and which are valueless as precedents ;
(2) Those cases which are substantially repetitions of what is reported already.
Include : (1) All cases which introduce or appear to introduce a new principle or a new rule ;
(2) All cases which materially modify an existing principle ;
(3) All cases which settle or materially tend to settle questions upon which the law is doubtful ;
(4) All cases which for any reason are peculiarly instructive.

The abuse to which Lord Justice Bankes was referring may be due to competition in the trade, and to the system of remuneration. It is always difficult to say that a case is of no value. The *Law Times* reporter may say that it is of value to him. The *Times* law reporter may say it is of value to him, and for the same reason. The *Law Reports* reporter and the *Law Journal* reporter may reject the case altogether.

Shelf space for the Law Reports is also becoming a difficult question for practitioners. When in one year Reports, Statutes, Digest, and Weekly Notes make up ten volumes, or about 500 volumes from 1865, plus 150 volumes of the English Reports or 125 of the Revised Reports, we feel in sympathy with the American Bar Association, whose committee reported in 1900: "We suggest that it be recommended to reporters of the national system and to the official reporters of the various States that they omit such cases as are clearly of no value as precedents and report only the syllabus or at most an abstract of the cases in which the opinion deals merely with questions of fact or applies well-known principles to familiar conditions of fact and in which the prior cases are not distinguished but merely applied to the case in hand. In such cases reference should be made to the leading cases cited in the opinion."

Digests.—The trade has endeavoured to meet the difficulty in various ways. First came the Digests. They proved a boon to the busy practitioner. The Council of Law Reporting was not found wanting in this respect. It published a consolidated Digest covering the years 1865-90 and Decennial Digests to 1910. In 1912 it decided to go a step further, and announced in its annual report that for the convenience of the profession an important change had been made in the character of the Current Index. Up to the end of 1911 the Current Index was confined to cases in the Law Reports.

From the beginning of 1912 it began to include all cases appearing in any of the contemporaneous reports, and thus became a digest published quarterly of all reported cases. As such it is invaluable.

In the United States the Century Digest, of which a copy was presented to the Middle Temple Library by Mr. Joseph Choate, contains a reference to every reported case. It was the outcome of many suggestions, and is the basis of uniformity of classification in the reports and digests of the different jurisdictions throughout the States.

One can only hope that if and when it be decided to publish a fifty years' *Law Reports* digest, which would be due next year, and to which the profession is looking forward, some attempt may be made to bring the older consolidated digests into line with the recent Current Indexes and furnish a fifty years' digest of all reported cases. It would be a big undertaking, and might involve some financial loss, as did the presentation of the Decennial Digest 1901-10. But the Council's balance-sheets look as if they would be able to stand the strain. Moreover, other digests are projected. Messrs. Butterworth, as Lord Halsbury's *Laws of England* is nearing completion, will probably commence in the near future the digest of all reported cases from the earliest times to 1917. This ought to spur the Council of Law Reporting. For a brief period from 1908 to 1914 the *Times* Index, under the heading Law Cases, became of very great value to the profession. But the scheme of indexing was then curtailed, and nothing now remains but the alphabetical list of parties.

The Authority of Text-Books.—Another solution has been found in recent years by means of encyclopædias, the modern form of the Abridgments associated with the names of Viner, Comyns, Bacon, and Rolle. Sir Alexander Wood Renton's *Encyclopædia of Law* was followed by Lord Halsbury's *Laws of England*. The latter endeavoured to formulate the substance of many cases after the manner of a code with references instead of an abstract of every case as in the Abridgments. The result is excellent. But the Courts object to be bound by such formulae. Not long ago, in the Judicial Committee of the Privy Council, Sir Robert Finlay, in the course of argument in a Canadian appeal, *Davies* v. *James Bay Railway Company*, referred to the *Laws of England* edited by Lord Halsbury. The Lord Chancellor (Viscount Haldane) said: "So far as I am concerned I protest against its being cited as an authority, and I may say that it is not to be cited here again."[1] Yet the abridgments are always cited as authority. Why not a standard work backed by a great name? The Courts adopt a similar attitude towards text-books. Sir Edward Clarke, in the course of argument in *Greenlands, Limited*, v. *Wilmshurst*,[2] said he would preface his argument by quoting the statement (on the question of privilege) in Lord Halsbury's *Laws of England* vol. 18, at p. 689. Sir Edward then proceeded to refer to

[1] 83 L.J. P.C., p. 339 at p. 342.
[2] 29 Times Law Reports, p. 685 at p. 687.

Dr. Blake Odgers' work on Libel. Lord Justice Vaughan Williams said: "I think we ought in this Court still to maintain the old idea that counsel are not entitled to quote living authors as authorities for a proposition they are putting forward, but they may adopt the author's statements as part of their argument."

Other Systems of Law Reporting.—It may be of interest to add a few particulars of the methods of law reporting among the other English-speaking peoples, since they show in a greater or less degree the influence of the development of the system now existing in England.

Scotland.—In Scotland the evolution proceeded on very similar lines, though the name of the reporter persists much later for purposes of citation, e.g. Rettie, Fraser, Adam, etc. Then came the Scotch Session Cases, being cases decided in the Court of Session, and also in the Court of Judiciary and House of Lords and published for the Faculty of Advocates.

Ireland.—In Ireland the Bar seems to have been impressed with the reforms which Daniel had effected in Law Reporting in England, and asked for information of the Council of Law Reporting, and forthwith began putting their house in order. The identity of the reporter fades out much earlier in Ireland than in England or Scotland.

Canada.—There is no doubt that the reform in England produced a marked change in the Overseas Dominions. In Canada it reached high-water mark. By the Act establishing a Supreme Court and a Court of Exchequer for the Dominion of Canada, 38 Vict. c. 11 (1875), it is provided by s. 71 that: "A *précis* writer shall be appointed by the Governor in Council to report the decisions of the Supreme Court and of the Exchequer Court of Canada, and shall act as secretary to the Chief Justice and Judges appointed under this Act, and such *précis* writer shall be paid a salary to be determined by the Governor in Council." S. 73 says: "The reports of the decisions of the Supreme Court and of the Exchequer Court shall, subject to the direction of the Judges of the said Courts, be published by the Registrar appointed under this Act."

In the Revised Statutes of Canada (1906) further provision is made by c. 135, s. 20: "The Governor in Council may appoint a reporter and assistant-reporter who shall report the decisions of the Court (*i.e.* the Supreme Court), and who shall be paid such salaries respectively as the Governor in Council determines." In the 1915 Reports of the Supreme Court of Canada, Mr. C. H. Masters, K.C., appears as reporter, and Mr. L. W. Coutlee, K.C., as assistant-reporter.

In Ontario and Quebec, however, the practice approximates to that which obtains in this country. The Ontario Law Reports, being cases determined in the Supreme Court of Ontario (Appellate and High Court Division), are reported under the authority of the Law Society of Upper Canada. Les Rapports Judiciaires de Québec are published by the General Council of the Bar of the Province of Quebec, and are supplied to all practising advocates

in the province on the Roll. The Reports form three volumes per annum. The King's Bench cases form one volume complete, and the Superior Court Cases form two volumes. The price to the public is $9 a year. There is also in Quebec a series of Practice Reports published by private enterprise, and known as Rapports de Pratique de Québec. This series expressly disclaims competition with existing publications, and acknowledges encouragement from Bench and Bar.

In the Western Provinces there are Official Court Stenographers in Manitoba and Saskatchewan, and in Yukon a Court Reporter. The nearest approach to this in England was the appointment by the Lord Chancellor and the Lord Chief Justice under the Criminal Appeal Rules, 1908, of shorthand writers for the purposes of the Criminal Appeal Act, 1908. The practice has worked so well as to justify its extension to all courts of law.

Australia.—In Australia there are the Commonwealth Law Reports, being cases determined in the High Court of Australia commencing in 1903; the Victorian Law Reports published in Melbourne, and being cases determined in the Supreme Court of Victoria and in Chambers, and published under the superintendence and control of the Council of Law Reporting in Victoria; the New South Wales State Reports, forming a new series commencing in 1901 in four volumes. Queensland, South Australia, and West Australia have similar series.

New Zealand.—The New Zealand Law Reports contain cases determined by the Court of Appeal of New Zealand printed for the New Zealand Council of Law Reporting, consisting of elected members from Auckland, Wellington, Christchurch, and Dunedin, and the Attorney-General and Solicitor-General as *ex-officio* members.

India.—The Indian Law Reports are published in four series—Calcutta, Madras, Bombay, and Allahabad, under the authority of the Governor-General in Council. They contain cases determined by the High Court and by the Judicial Committee on appeal from the particular High Court. These appeals raise questions of very great importance, and the Council of Law Reporting for England and Wales show their appreciation by printing the Indian Appeals in a separate volume, and have also compiled a digest of Indian Appeals covering the period 1874-1893. The other Provinces and States have series of reports issued under the authority either of the Judiciary or the State.

South Africa.—The South African Law Reports contain decisions of the Supreme Court of South Africa (Appellate Division), Orange Free State (Provincial Division), Cape of Good Hope (Provincial Division), Eastern Districts (Local Division), Natal (Provincial Division). The reporting is done by advocates, but the reports are published by J. C. Juta & Co., except in the case of Natal, where they are printed for the Incorporated Law Society of Natal, following the English model.

Crown Colonies.—One of the most encouraging features of the influence

of the Law Reports is the work in the smaller sectors of the Empire, of which a few examples may be given. In Trinidad and Tobago some reports have been compiled of judgments delivered in the Supreme Court there from December 8, 1893, to April 1, 1910. They are printed at the Government printing office, Port of Spain. At a meeting of the Finance Committee of the Legislative Council, the Hon. H. A. Alcazar, K.C., had called attention to the advantage that would accrue if judgments of the Supreme Court of the Colony already delivered were collected, printed, and published in book form, and if all future judgments were printed and published in the *Royal Gazette*. Since May 1910, the latter has been done. A small committee was appointed by the Governor to deal with judgments delivered prior to May 1910. Owing to the destruction of the Court records in the fire of 1903, there were no copies of judgments delivered prior to that date in the possession of any public official. The Hon. H. A. Alcazar, K.C., Mr. L. A. Wharton, K.C., and Mr. J. D. Hobson had preserved copies of some judgments. The committee made a selection. We are promised in the preface to these that other judgments since May 1910 will be similarly dealt with.

Cyprus.—The Cyprus Law Reports of cases decided in the Supreme Court of Cyprus on appeal from the District and Magisterial Courts and by Assize Courts are published by authority of the judges of the Supreme Court, and printed at the Government printing office, Nicosia.

Straits Settlements.—The Straits Settlements Law Reports with an appendix containing Federated Malay States Reports are published under the direction of the Committee of the Singapore Bar, with the approval of the judges of the Supreme Court.

Official Character of Reports.—It will be noticed that there is a constant striving to obtain reports which may be said to be official or authorised. This is probably carried further in the United States than elsewhere. But the Law Reports (England) have never claimed Government or official sanction. Indeed, when Mr. J. M. Moorsom, K.C., who was in 1881 appointed by the House of Lords their official reporter, and who since 1875 had been a member of the Law Reports staff, resigned, the Council of Law Reporting then arranged with the House of Lords that for the future the official reporter in the House should, subject to approval by the House, be appointed by the Council, the Council undertaking the payment of the whole salary. The underlying idea is that any Law Report vouched by a barrister may be used in Court. And this accords with the long practice of reporting, at first, according to Maitland, identified with the law apprentices in their note-books, and followed by the reports of Plowden, Coke, Dyer, etc., in the sixteenth century, and Ventris, Shower, Holt, Salkeld, Beavan, East, and others later.

United States.—From the year 1785 efforts were made in the United States to deal by statute with law reporting. In that year a law was passed requiring judges of the Supreme Courts to file written opinions in disposing

of cases on points of law, so that they might be properly reported and thereby a foundation laid for a more perfect and permanent system of Common Law. This statute made possible the first regular printed Law Reports in America. In 1789, Ephraim Kirby made a collection of cases known as Kirby's Reports. In 1798 Kent introduced written opinions and Dallas published the first volume of United States Supreme Court Reports. In 1803 Massachusetts established the office of reporter, and appointed Ephraim Williams. In 1804 the Legislature provided for a regular reporter on a salary, and Cranch began the publication of his reports. The first Law Library in the States (temp. 1802) at Philadelphia contained 375 volumes, nearly all reports of cases, and all English save three.

Daniel Webster, inspired by Story's contributions to legal literature, was opposed to this dependence on English reports, and advocated American reports and American law pure and unadulterated. Reports and reporters multiplied exceedingly until the American Bar Association gave expression to the grievous burden of six thousand volumes of reports under which the profession lay. It has been diminished by the Reporter System comprising the Pacific Reporter, Atlantic Reporter, North-Western Reporter, North-Eastern, South-Western, and South-Eastern, which cover all the States, together with the Federal Reporter containing the reports of the Supreme Court of the United States. This National Reporter System seems to leave nothing undone that ought to be done. But probably much is done that might with advantage be left undone. It has been proposed that the reports of the Supreme Court of the United States should be prepared and published by the Government and sold at very much less than subscribers are now compelled to pay for them, and that with proper effort they could be issued promptly and all private reports of the same case could be dispensed with.

The American reports have been in great and increasing demand in England owing to the prize cases and company and corporation cases. But their volume makes it almost impossible to house them, and in fact if all that are available in London were brought together there would not be a complete collection. There is no comparison between the shelf space required for the English reports and what would be required for a full set of American Reports. It is not surprising therefore that failing State action private firms have taken the field and are offering sets of American Decisions and Reports covering the period from 1760 to the Lawyers' Annotated Reports and the National Reporter System, and the services of a free Citation Bureau to enable the American lawyer to keep pace with the output of reporting in the various States. One Citation Bureau commenced in 1896 a system of entering the names of cases cited on cards. These have been continually augmented until they number one and a half million citations. If any American lawyer wishes to know where and when a case has been cited he may apply to this bureau by a coupon. It appears to be on the lines of the English noter-up system, but more thorough.

Advantages of English System.—In 1903 the Committee on Law Reporting and Digesting recommended to the American Bar Association that the judges shall decide what cases shall be reported in order to diminish the volume of the reports. But the recommendation was recommitted. Next year at St. Louis a Council of Law Reporters in each State was suggested. And at Narragansett Pier in 1905 the Committee deplored that they had no Council of Law Reporting as in England, and that the reporters did not represent the Bar and could not as individuals exercise even their best judgment in withholding opinions from publication.

In the light of experience it does seem that the English system of reporting meets the difficulties experienced in the United States. It is essentially a privilege of the Bar, and represents the Bar, and possesses the added advantage of frequent revision by the Bench of judgments, especially when delivered extempore. Probably by closer co-operation between the Bench and Bar as represented by the Council of Law Reporting some improvement might be effected and space economised. Modern reports lack the brevity and terseness of the abridgments and the older reports. Long excerpts from cases cited could be omitted. Long recitals of facts and their repetition in the judgments are unnecessary and redundant. The reporter might well exercise his discretion in these respects. A good example of curtailment is the *Olympic* in the House of Lords, reported in L.R. 1915 Appeal Cases, p. 385. It occupies rather less than one page. It came before the House on July 24, 27, 28, 31, August 3, and October 20, 1914, when consideration was adjourned *sine die*. It was further considered on November 9, 1914. The Lord Chancellor reviewed the evidence and gave judgment dismissing the appeals. Lord Atkinson also delivered judgment. Other noble lords concurred. Beyond recording the result the reporter evidently thought the case was amply covered by the report of the case in the Court of Appeal to be found L.R. 1913, P. p. 214.

Delays in Reporting.—It will be noticed that the report of the *Olympic* case in the House of Lords was included in the May number of 1915 Appeal Cases. Judgment was delivered in November 1914. An interval of six months elapsed between judgment and report. This long delay called for serious comment recently[1] in the Admiralty Division. In a suit as to salvage services supervening upon a contract for towage services, the President said he had collated the authorities and had gone into the matter fully in a recent case (the *Leon Blum*, 31 T.L.R. 2, then under appeal), and continued: "It is extremely inconvenient to stay the reporting of important cases in the official Law Reports until after an appeal has been heard. It sometimes happens that appeals which have been entered are afterwards withdrawn or the hearing is greatly delayed. People are entitled to have the report for what it is worth within a reasonable time of the judgments being delivered." The judgment was delivered on July 31

[1] *Times*, March 12, 1915.

1914. Seven and a half months afterwards the report was still unpublished in the Law Reports.

It is matter for regret and is contrary to one of the principal aims Lord Lindley had in view when the Law Reports were initiated. He said: "Reports should be published as speedily as is consistent with a conscientious discharge of the reporter's duties. In order to accomplish this he proposed to give reporters facilities of access to all pleadings and other documents forming part of the records of the Court." And he added: "It would be well if all documents furnished to the judge should, when he has done with them, go to the reporters for a time. In this way he hoped and required reporters to publish their reports periodically, say once a month, and never to be more than a month in arrear." At present one might say this ideal is never realised. On the other hand, the Weekly Notes greatly atone for the delay, for which probably the reporter may not be altogether to blame. It is not always easy to obtain the papers in a particular case. It takes considerable time to peruse them, which the conscientious reporter must of necessity do, and further time is consumed in submitting judgments to individual judges for revision and approval.

But despite difficulties, defects, shortcomings, and competition, the Council of Law Reporting have built a glorious monument to themselves and to the profession during the half-century of their existence. Their editors and reporters may well be proud of the result of their labours. Probably the greatest tribute to the system is the basis it has furnished for law reporting throughout the Empire.

THE EFFECT OF WAR UPON THE PROCEDURE OF THE SUPREME COURT.

[*Contributed by* H. G. Waterson, Esq.]

From its earliest stages the present war has had its effect upon the Courts.

Moratorium.—On August 2 last, before Great Britain was a belligerent, a Royal Proclamation was made enabling the acceptor of a bill of exchange to re-accept such bill in such form as to secure a postponement of the time of payment for one calendar month after the date of its original maturity. This Proclamation was quickly succeeded by others widening the scope and lengthening the period of extended credit, and the moratorium thus established was applicable to payments due under all sorts of contracts, with certain exceptions. This extension of credit was established "in view of the critical situation in Europe and the financial difficulties caused thereby,"[1] and it had the effect of stopping the institution of many actions at law which would otherwise have been brought. The moratorium thus established did not affect the validity of the contracts concerned. That it simply provided a defence to money claims to which it applied was made clear by the Directions issued by the Lord Chief Justice on August 12 last that writs of summons were to be issued as theretofore. These Directions further provided that judgments in default of appearance were not to be signed in cases where it appeared upon the writ that the claim was one coming within the Proclamations, and execution was not to issue without leave of the Master upon any judgment already signed, nor was summary judgment to be ordered, nor garnishee orders to be made, where the debt sued for came within the Proclamations. Judgment debts were, however, declared not to be within them. In the main, so far as litigation was concerned, the effect of the Proclamations was to prevent the bringing of actions in certain cases, and the effect of the Directions of the Lord Chief Justice was to regulate the procedure of obtaining and enforcing judgments.

The Directions foreshadowed the detailed and extensive provisions made afterwards by the Courts (Emergency Powers) Act, 1914, which is alluded to hereafter.

Prize Courts.—The occurrence of a war in which the naval forces of the

[1] Proclamation for postponing the payment of certain Bills of Exchange, August 2, 1914.

country are employed caused not so much a variation in procedure as a reinstitution of the Prize Courts, which had naturally fallen into disuse during the long preceding period of naval peace.

A short Act called the Prize Courts (Procedure) Act, 1914, was passed on the outbreak of war, dealing with Prize Court Procedure, and to be applied together with the Acts of 1864 and 1894.

Courts (Emergency Powers) Act.—The greatest variation in procedure brought about by the war is attributable to the Courts (Emergency Powers) Act, 1914. The material provisions of this Act, which was passed on August 31, 1914, are as follows:

S. 1. (1) From and after the passing of this Act no person shall

(*a*) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such Court and such notice as may be provided for by Rules or Directions under this Act; or

(*b*) levy any distress, take, resume or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this sub-section applies, for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act.

This sub-section shall not apply to any sum of money (other than rent not being rent at or exceeding £50 per annum) due and payable in pursuance of a contract made after the beginning of August 4, 1914.

The meaning of this last paragraph, which is awkwardly expressed, seems to be that protection is not extended to sums of money due under contracts made on or after August 4, 1914, but that the Act does extend its protection where it is sought to recover a sum of money on account of rent under £50 per annum, even where the lease was granted on or after August 4, 1914 The Act proceeds:

(*Sub.-s.* 2.) If on any such application the Court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the present war, the Court may, in its absolute discretion, after considering all the circumstances of the case, and the position of all the parties, by order, stay execution or defer the operation of any such remedies as aforesaid for such time and subject to such conditions as the Court thinks fit.

It further provides (s. 1, sub.-s. 3) that similar discretion in favour of the debtor may be exercised by the Court "where a bankruptcy petition has been presented" against him, and it can stay such petition for such time and subject to such conditions as it thinks fit.

The Act has already been the subject of several decisions as to its meaning and effect. Thus it has been decided that s. 1, sub.-s. 1 (*a*), does not apply to bankruptcy petitions inasmuch as sub.-s 3 expressly deals with them; so that while the Court has power to stay a petition *when presented*, there is no necessity to obtain leave to present a petition.[1] Similarly the Act has been held not to apply at all to a petition to wind up a company.[2] It has also been decided that leave of the Court is not required for the commencement of proceedings for foreclosure, or the issue of a writ in a debenture holder's action for realising a security, or the appointment of a receiver and manager for the preservation of the property.[3]

Subject to the operation of the Act being determined or limited by Order-in-Council, the same is to have effect during the continuance of the present war, and for six months afterwards.

Rules were made under the Act and came into effect on September 8, 1914. They provide that applications under s. 1 (1*a*) of the Act should be made to the Court by which the judgment or order has been given or made, or in which it is being sought, and that application under s. 1 (1*b*) may be made in any case to the High Court, but a limited jurisdiction is given to the inferior Courts, and if resort thereto is not made where possible, the extra costs occasioned may be ordered to be borne by the applicant and the application may be remitted to the proper Court.

The Act and Rules introduce new principles and new procedure in the Courts, and both the Chancery and King's Bench Divisions are constantly engaged in hearing applications of a novel character in which leave is sought to exercise powers and take advantage of remedies which before the war were available without restriction. Where such applications are under s. 1, sub-s. 1 (*a*), and in respect of judgments already obtained, they are made by summons; where judgment has not been obtained, application can be without summons. Under s. 1, sub.-s. 1 (*b*), the application is by originating summons in that Division which ordinarily deals with matters to which the summons applies. The summonses have at their foot a notice drawing attention in the clearest language to the respondent's rights under the Act. Directions are given upon the hearing as to the evidence required; and the application may be ordered to be heard in private.

Proceedings against Enemies.—On March 16, 1915, was passed the Legal Proceedings against Enemies Act, 1915, giving the Court power in certain cases to sanction the issue of proceedings for service on enemies out of the jurisdiction and to direct by an Order (referred to as an enemy service order) substituted service of such proceedings; further, by s. 3, where the best evidence of documents is unobtainable in such proceedings, other evidence may be admitted. This Act, however, only applies where the

[1] Re *Silber*, 1915, W.N. 71.

[2] *Globe Trust Ltd.*, 31 T.L.R. 280, and *re Two Companies*, 31 T.L.R. 241.

[3] *Farnol, Eades, Irvine & Co., Ltd., Carpenter* v. *the Company*, 1915, 1 Ch. 22.

plaintiff is a British subject or corporation, and the defendant, or one of the defendants, is an enemy, and the claim is for a declaration as to the effect of the present war on rights or liabilities under a contract entered into before the war. Rules and Directions have been issued as to the procedure under this Act, and all applications thereunder are to be made in the first instance to the King's Bench Division, to the nominated judge, by whom, if necessary, they may be transferred to another Division.

It cannot be said that the effect of the war upon procedure has been remarkably great. Existing forms and methods remain, and up to a very recent date the whole intention of the additional procedure has been the protection of defendants who have suffered financially on account of the war; while the most recent innovation has for its object the facilitation of the settlement of questions arising in connection with the claims of British subjects against alien enemies outside the jurisdiction.

CONTRABAND OF WAR.

[*Contributed by* G. G. PHILLIMORE, ESQ., B.C.L.]

IT may not be amiss at the present time to take stock of the position from the point of view of general international law as regards contraband of war and the results arising from the declarations of the belligerents in the present war.

Contraband and blockade cover the whole field of neutral rights so far as private persons are concerned, and constitute the only recognised limitations of the right of citizens of neutral nations to carry on their trade in war as in peace. It is true that the measures of retaliation adopted by both belligerent groups in the present war, viz. the blockade at long range by the Allies to prevent all trade between Germany and other nations and the submarine warfare by Germany against all vessels in the area of the British Isles, have obscured the importance of those limitations for the time. But the international customs and principles, sanctioned by the practice of civilised nations for three centuries, have an inherent force which is bound to re-establish them in their former position. "Naturam expellas furca tamen usque recurret"—apart from the fact of their deliberate adoption by the chief Maritime States only a few years ago (1909) in the Declaration of London, to which both belligerents, although not strictly bound by it[1] as a definitive international treaty, have appealed as a document of moral authority and a standard code of principles which should be utilised so far as circumstances admit.

The Declaration of London.—The British Government, in the Order-in-Council of August 20, 1914, declared that the Declaration, subject to certain modifications and additions rendered necessary by the special conditions of the present war as to destination of goods and the exclusion of the lists of contraband and non-contraband afterwards mentioned, should be adopted and put in force for the present war, and this was reaffirmed by the Order-in-Council now in force of October 29, 1914. The German Government has adopted it as the basis of moral law in this war, and has invoked our departures from its provisions as justifying their measures of retaliation. The neutral nations have also assumed its moral obligations. In every war the relative positions of belligerents and neutrals must always affect the actual denotation of contraband, and in a war like the present, in which the belligerents include all the principal maritime Powers other than the United States, the belligerent bias must have more effect than the neutral. Doubtless our own position of neutrality for the greater part of the last half-century has influenced us in taking up for wars in which we were not a party a more

[1] As to the legal position of the Declaration of London, see also *supra*, pp. 72-5.

restricted interpretation of contraband. There have, indeed, been expressions of opinion from publicists of acknowledged position that we should take advantage of the present war to free ourselves from international agreements which may be thought to weaken our effective belligerent action at sea, such as this Declaration and that of Paris; but, unless our national policy contemplates belligerency on our part in every naval war of the future, wisdom, no less than regard for our political character and tradition of continuity in our international relations, seems to be against our going back altogether on principles to which we have given our adhesion, whether finally or provisionally. The preamble of the Declaration of London states that the Conference was held on the invitation of our Government to various Powers to meet in conference in order to arrive at an agreement as to what are the generally recognised rules of international law within the meaning of the Hague Convention of October 18, 1907, relative to the establishment of an International Prize Court, and refers to the advantages which an agreement as to those rules, in the unfortunate event of naval war, would present, both as regards peaceful commerce and as regards the belligerents and their diplomatic relations with neutral governments, and the divergence often found in the methods by which it is sought to apply in practice the general principles of international law. The preliminary provisions of the Declaration, moreover, declare that the signatories are agreed that the rules contained therein correspond in substance with the generally recognised principles of international law. It is also well known that the Declaration reproduces and only gives systematic form to rules and principles long established in our own prize law: the innovations are few, and will generally be found to be a compromise between conflicting national views or concessions to modern opinion.

Declaration of Moral Obligation only.—At the same time, the fact of the non-ratification of the Declaration by any of the combatant Powers must be allowed to limit its effect to that of a moral obligation only. It cannot claim to be more than an academical code of prize law, and after due weight has been given to the eminent talents of its framers and to the fact that it represents the result of careful deliberations by representatives of the chief maritime Powers, it cannot be said to have taken into account all the new questions raised by the present war as to belligerent and neutral rights by novel conditions of warfare, especially the operations of submarines. Nevertheless, the Declaration of London, with such modifications as present conditions of warfare and commerce show to be necessary, may at any rate claim to hold the field, putting it, even at the lowest, as a *projet* of international law on the law of prize.

The Range of Contraband.—It is proposed to consider first the scope assigned to contraband in the present war by comparison with the provisions of the Declaration of London, and secondly, the nature of the measures of retaliation so far as they are connected with contraband.

The Declaration preserves the traditional classification of contraband into two classes, the absolute, viz. things which are exclusively for use in war, and conditional, viz. things which are susceptible of use in war as well as for purposes of peace. It sets out lists of each, with a power to the belligerents to add like articles to each or to waive the right to treat any article in such lists as contraband by notification to the governments of other Powers, as well as a "free list" of articles which are not susceptible of use in war and may not be declared contraband. The notion of contraband connotes two elements: (1) objects of a certain kind; (2) objects having a certain destination.

The lists of the Declaration follow with the belligerents' divergencies therefrom annexed. It is believed that as regards the Allies the British and French lists are identical, except for the latest British additions in brackets, and the Russian list is the same as the list given in the British Proclamation of October 29, 1914.

Absolute Contraband.

Declaration.—1. Arms of all kinds, including arms for sporting purposes, and their component parts.

Allies (1) and German (1).

2. Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

Allies (2) and German (2).

3. Powder and explosives specially prepared for use in war.

Allies (3); German (3) runs: Powder and explosives of all kinds.

The Allies add: Russian (4), sulphuric acid; French and British (4) Ingredients of explosives, viz. nitric acid, sulphuric acid, glycerine, acetane, calcium acetate (and all other metallic acetates),[1] sulphur, potassium nitrate, the fractions of the distillative products of coal tar between beryol and cresol inclusive, aniline, methylaniline, dithymethylaniline, ammonium perchlorate, sodium perchlorate, sodium chlorate, barium chlorate, ammonium nitrate, cyanamide, potassium chlorate, calcium nitrate, mercury.

(5) Resinous products, camphor and turpentine (oil and spirit).

4. Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.

Allies: Russian (5), British and French (6), same.

German (4) runs: Cannon barrels, gun mountings, limber boxes, limbers, field kitchens and bakeries, supply wagons, field forges, searchlights and searchlight accessories, and their distinctive component parts.

[1] Deleted by British Proclamation of May 27, 1915.

Russian (6), British and French (7), and German (5) add :

Range-finders and their distinctive component parts.

German (6) adds: Field-glasses, telescopes, chronometers, and all kinds of nautical instruments.

5. Clothing and equipment of a distinctively military character.

Allies : Russian (7), British and French (8). German (7), same.

6. All kinds of harness of a distinctively military character.

Allies : Russian (9), British and French (10). German (9), the same.

7. Saddle, draught, and pack animals suitable for use in war.

Allies : Russian (8), British and French (9). German (8), the same

8. Articles of camp equipment and their distinctive component parts.

Allies: Russia (10), British and French (11). German (10), the same.

9. Armour plates.

Russia (11), British and French (12). German (11), the same.

Russian adds :

12. Hæmatite iron ore and hæmatite pig iron; 13. Iron pyrites; 14. Nickel ore and nickel; 15. Ferrochrome and chrome ore; 16. Copper, unwrought; 17. Lead, pig, sheet, or pipe; 18. Aluminium; 19. Ferro-silica.

German (12) adds: Lead, pig, sheet, or pipe.

British and French add :

(13) Ferro alloys, including ferro-tungsten, ferro-molybdenum, ferro-manganese, ferro-vanadium, ferro-chrome.

(14) The following metals: tungsten-molybdenum, vanadium, nickel, selenium, cobalt, hæmatite pig-iron, manganese.

(15) The following ores: wolframite, scheelite, molybdenite, manganese ore, nickel ore, chrome ore, hæmatite iron ore, zinc ore, lead ore, bauxite.

(16) Aluminium, alumina, salts of aluminium.

(17) Antimony, together with the sulphites and oxides of antimony.

(18) Copper unwrought and part wrought, and copper wire.

(19) Lead, pig, sheet, or pipe.

Russian (20), British and French (20), and German (13) add :

Barbed wire, and implements for fixing and cutting the same.

German (14) adds : Tin plate.

10. Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

Allies : all (21), same.

German (15) runs :

Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war; ship plates and construction steel.

British and French (22), and German (16) add:

Submarine sound-signalling apparatus.

Russian (22), British and French (23), and German (17) add:

Aeroplanes, airships, balloons, and aircraft of all kinds, and their distinctive component parts, together with accessories, articles and materials recognisable as intended for use in connection with balloons and aircraft.

Allies: Russian (23), British and French (24), add:

Motor vehicles of all kinds and their component parts.

Russia (24) adds: Motor tyres, rubber.

Allies: British and French add:

(25) Tyres for motor vehicles and for cycles, together with articles or material especially adapted for use in the manufacture or repair of tyres.

(26) Rubber (including raw waste and reclaimed rubber) and goods made wholly of rubber.

(27) Iron pyrites.

Russian (25), British and French (28), add:

Mineral oils and motor spirit, except lubricating oils.

11. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land and sea.

Allies: Russia (26), British and French (28), the same.

German (18) runs:

Implements and devices designed exclusively for the manufacture and repair of arms and munitions of war.

German add:

(19) Lathes of all kinds; (20) Mining lumber; (21) Coal and coke; (22) Flax.

Allies: British and French add:

Raw wool, wool tops and noils and woollen and worsted yarns; tin, chloride of tin, tin ore; castor oil, paraffin wax, copper iodide, lubricants; hides of cattle, buffaloes, and horses; skins of calves, pigs, sheep, goats, and deer; leather, undressed or dressed, suitable for saddlery, harness, military boots, or military clothing; ammonia and its salts, whether simple or compound; ammonia liquor; urea, aniline, and their compounds.

British (May 27, 1915) adds:

(Toluol, and mixtures of toluol, whether derived from coal-tar, petroleum, or any other source.

Lathes and other machines or machine-tools capable of being employed in the manufacture of munitions of war.

Maps and plans of any place within the territory of any

belligerent, or within the area of military operations, on a scale of four miles to one inch, or on any larger scale, and reproductions on any scale by photography or otherwise of such maps or plans.)

Conditional Contraband.

Declaration.—1. Foodstuffs (which include products necessary or useful for sustaining man, whether solid or liquid).

Allies (1), same (except the bracket), with addition for British and French: The terms "foodstuffs" and "feeding stuffs for animals" in the list of conditional contraband include oleaginous seeds, nuts, and kernels; animal and vegetable oils and fats (other than linseed oil) suitable for use in the manufacture of margarine; and cakes and meals made from oleaginous seeds, nuts, and kernels.

British of May 17, 1915, deletes words in brackets and adds "linseed oil."

German (1), same as (1) Declaration.

2. Forage and grain suitable for feeding animals.

Allies (2) runs: Forage and feeding stuffs for animals.

German (2) runs: Forage and all kinds of feeding stuffs.

3. Clothing, fabrics for clothing, and boots and shoes suitable for use in war.

Allies (3) and German (3), same.

Germans add (4):

Wool from animals, raw or dressed, together with woollen carded yarns and worsted yarns.

4. Gold and silver in coin or bullion; paper money (which only includes inconvertible paper money, *i.e.* bank-notes, which may or may not be legal tender. Bills of exchange and cheques are excluded).

Allies (4) and German (5), same (except the bracket).

5. Vehicles of all kinds, other than motor vehicles, available for use in war, and their component parts.

Allies (5), same, and German (6) runs:

Vehicles of all kinds, especially all motor vehicles available for use in war, and their component parts.

And German:

(7) Rubber tyres for motor vehicles, together with all articles or materials especially used in the manufacture or repair of rubber tyres.

(8) Rubber and guttapercha, together with goods made thereof.

6. Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.

Allies (6), same; German (21), same.

7. Railway materials, both fixed and rolling-stock (including fixtures such as rails, sleepers, turntables, parts of bridges, and rolling-stock such as locomotives, carriages, and trucks), and materials for telegraphs, wireless telegraphs, and telephones.

Allies (7) and German (9), same, except the bracket.

8. Fuel, other than mineral oils; lubricants.

Allies, same; German (10) runs:

Fuel, excepting coal and coke; lubricants.

9. Powder and explosives not specially prepared for use in war.

10. Sulphur.

German (11) runs:

Sulphur, sulphuric acid, nitric acid.

11. Glycerine.

Germans add:

(13) The following ores: wolframite, scheelite, molybdenite, nickel ore, chrome ore, hæmatite iron ore, manganese ore, lead ore.

(14) The following metals: wolfram, molybdenum, vanadium, nickel, selenium, cobalt, hæmatite pig-iron, manganese, aluminium, copper.

(15) Antimony, together with the sulphides and oxides of antimony.

(16) Ferro alloys, including ferro-wolfram, ferro-molybdenum, ferro-manganese, ferro-vanadium, ferro-chrome.

12. Horse-shoes and shoeing materials.

Allies (12) and German (12), the same.

13. Harness and saddlery.

Allies (13) and German (17), same.

14. Hides of all kinds, dry or wet; pig-skins, raw or dressed; leather, undressed or dressed, suitable for saddlery, harness, or military boots.

Allies: Russian (14) same; for British and French, see absolute contraband list above.

British and French also add:

Tanning substances of all kinds (including extracts for use in tanning) are also declared as conditional contraband.

German (18) to (20) add:

(18) Leather, treated and untreated, when suitable for saddlery, harness, military boots or military clothing.

(19) Tanning materials of all kinds, including extracts used in tanning.

(20) All kinds of lumber, rough or treated, especially hewn, sawed, planed, fluted, excepting mining lumber; tar of charcoal.

15. Field-glasses, telescopes, chronometers, and all kinds of nautical instruments.

Allies: Russian (15) same; for German see absolute contraband list above.

Declaration: Free List.—Articles which are not susceptible of use in war may not be declared contraband. The "free list" is as follows: The italicised items are those made contraband by the Allies in the present war, and the corresponding provision of the German "free list" is annexed.

(1) Raw cotton, *wool*, silk, jute, flax, hemp, and other raw materials of the textile industries and yarns of the same.

German (1) runs: Raw cotton, raw silk, raw jute, raw hemp.

(2) *Oil seeds and nuts*, copra.

(3) *Rubber, resins*, gums and lacs, hops.

German (2) runs: Resin, lacs, hops.

(4) *Raw hides* and horns, bones and ivory. German (3).

(5) Natural and artificial manures. German (4).

(6) *Metallic ores* (product of mines from which metals are derived).

(7) Earths, clays, lime, chalk; stone, including marble, bricks, slates, and (roofing German) tiles. German (5).

(8) China ware and glass. German (6).

(9) Paper and paper-making materials. German (7).

(10) Soap, paint, and colours, including articles exclusively used in their manufacture, and varnish. German (8).

(11) Bleaching powder (German omits, and specifies chloride of lime), soda-ash, caustic soda, salt-cake, ammonia, sulphate of ammonia, and sulphate of copper. German (9), except as above.

(12) Agricultural, mining, textile and printing machinery. German (10).

(13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral. German (11).

(14) Clocks, watches, other than chronometers. German (12).

(15) Fashion and fancy goods. German (13).

(16) Feathers of all kinds, hairs (of certain animals, such as pigs and wild boars), and bristles. German (14), except words in brackets.

(17) Articles of household furniture (including carpets and mats) and decoration, office furniture and requisites. German (15).

The *free list* does not mean that all articles outside it might be declared contraband.

The Declaration also excludes from contraband:

(1) Articles serving exclusively to aid the sick and wounded, though these can in case of urgent military necessity and subject to payment of compensation be requisitioned if destined, as in Art. 30, to territory belonging to or occupied by the enemy or armed forces of the enemy, whether carriage of goods is direct or entails transhipment or a subsequent transport by land.

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of the crew (*i.e.* all persons in the

service of the vessel in general) and passengers during the voyage: hospital ships are not referred to.

Destination of Contraband.—The provisions of the Declaration as to destination of contraband have not been materially altered by the belligerents. It will be remembered that in the case of absolute contraband it is the ultimate destination (enemy territory or enemy armed forces), whether the carriage of the goods is direct or entails transhipment or subsequent carriage by land, that determines the right of capture; whereas in conditional contraband it is the immediate destination, and the goods must be destined for the use of the armed forces of the enemy or his Government departments unless in the latter case circumstances show that the goods cannot in fact be used for the purposes of the war in progress, but not if the goods are gold or silver in coin or bullion or paper money. In the case of absolute contraband a hostile destination is established (1) when the goods are documented for discharge in an enemy port or for delivery to his armed forces; (2) when the ship is to call at enemy ports only or when she is to touch at an enemy port or meet the enemy's armed forces before reaching the neutral port for which the goods in question are documented; (3) the ship's papers are conclusive proof of the voyage on which she is engaged unless she is found clearly out of the course so indicated and unable to give adequate reasons to justify the deviation (Arts. 30, 31, 32). The Allies extend the penalty of seizure to a ship when on a second voyage after she has proceeded to an enemy port with false papers (*i.e.* papers showing a neutral destination), although by Art. 38 of the Declaration a vessel may not be captured on the ground of having carried contraband on a previous occasion if such carriage be in fact at an end. The German regulation is similar to that of the Allies and makes the ship carrying contraband with false papers liable to capture and condemnation till the end of the war.

In the case of conditional contraband the Declaration provides that there is a presumption of such hostile destination as above indicated if the goods are consigned to enemy authorities or to a contractor established in the enemy country, who, as a matter of common knowledge, supplies such articles to the enemy; or if the goods are consigned to a fortified place belonging to the enemy or other place serving as a base for the armed forces of the enemy; but no such presumption can be applied to a merchant vessel bound for one of those places though she may in herself be conditional contraband, but only if her destination being for the use of the enemy's armed forces or his Government departments is distinctly proved. These presumptions may be rebutted, and where they do not arise the destination is presumed to be innocent (Art. 34). Conditional contraband is not liable to capture except when found on board a vessel bound for territory belonging to or occupied by the enemy or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port. The ship's papers are conclusive proof both as to the voyage on which the ship is engaged and

as to the port of discharge of the goods unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation (Art. 35). But in spite of this last provision conditional contraband if shown to have the destination referred to in Art. 33 is liable to capture in cases where the enemy country has no seaboard (Art. 36).

The Allies have added the case where the goods are consigned to or for an agent of the enemy State to the cases where a hostile destination is presumed to exist as above; they make conditional contraband liable to seizure (in spite of Art. 35) if on board a vessel bound for a neutral port if the goods are consigned "to order" or if the ship's papers do not show who is the consignee of the goods or if they show a receiver of the goods in territory belonging to or occupied by the enemy, and the owners of the goods must prove that their destination was innocent: and they enable the Government if satisfied that the enemy Government is drawing supplies for its armed forces from or through a neutral country to suspend Art. 35 from applying in respect of ships bound for a port in that country, and make a vessel carrying conditional contraband to a port in that country liable to capture.

The German regulations are similar in effect. They specify as the cases in which a hostile destination is to be presumed: when (*a*) the goods are consigned to an enemy authority or the agent of such or to a dealer shown to have supplied articles of the kind in question or products thereof to the armed forces of the administrative authorities of the enemy State; (*b*) the goods are consigned to order or the ship's papers do not show who is the consignee or the goods are consigned to a person in territory belonging to or occupied by the enemy; (*c*) the goods are destined for an armed place of the enemy or a place serving as a base of operations or supplies to the armed forces of the enemy, but merchant vessels themselves are not to be considered as destined for the armed forces or the administrative authorities of the enemy solely for the reason that they are found *en route* to such a place. Articles of conditional contraband are liable to seizure only on board a vessel *en route* to territory belonging to or occupied by the enemy or to the armed forces of the enemy, and such vessel is not intended to unload these articles in an intermediate neutral port, that is to say in a port at which the vessel is to call previous to reaching the ultimate destination designated; but this does not apply if conditions in (*b*) above are present or if the vessel is bound for a neutral country with regard to which it is shown that the enemy Government draws articles of the kind in question from that country.

Contraband not same as Prohibited Exports.—Both the British and French Governments have also prohibited the export of a number of articles presumably on the ground that they might be useful to the enemy if carried to him from a neutral country to which they might be sent, except under licence. This applies to neutral owned or produced goods as well as native ones. The French regulations, however, provide that contraband goods are

not necessarily prohibited for export, while the British Proclamation prohibits carriage of contraband abroad.

Necessity of maintaining Conventional Law.—A comparison of the present lists of contraband with those of previous wars, even with any so recent as the Russian and Japanese in the war of 1904, would not be of much practical utility except to show the marvellous progress made in the scientific and mechanical apparatus of war. For example, those lists do not mention air-craft or motor transport or the multifarious chemicals which now figure as explosives. In the present war the range of absolute contraband has been greatly extended in those directions because of the potential capacity of all forms of mechanical propulsion and chemical action for hostilities. The extension of warlike operations to the air and under the sea, and even the latest development of chemical warfare by asphyxiating gases, which it seems must now be reckoned with as part of the opposing system of hostilities entail a corresponding enlargement of contraband. The modern scientific modes of warfare must inevitably cause a danger of subordinating feelings of chivalry and humanity to the spirit of ruthless destruction of the enemy's forces by any means in order to obtain victory. This makes it all the more necessary to maintain a high standard of international opinion and practice and to keep to the conventional rules of war as much as possible. Until now the recognised methods of a belligerent's hostile action for preventing intercourse between the enemy and neutral nations have been contraband and blockade. The former allows him to stop the enemy from receiving articles capable of military use and service ; the latter enables him to prevent anything being carried to the enemy at certain specified points, by setting up a state of siege of those parts of his coast. But though under modern conditions a blockade can be carried on at long range, yet it must comply with conditions of warning to neutrals, continuous effectiveness, etc., which limit its effect. Contraband is more elastic, and this war has seen the extension of the doctrine to a degree unknown before, as regards conditional contraband, by the Allies' policy of inducing neutral nations which import such goods to prohibit their export to the enemy, as they can do without breach of their neutral obligations. But international law does not sanction the application of the doctrine of blockade to contraband by a prohibition of trade between the enemy and neutral nations and thus obtain the benefits of blockade without observing its recognised conditions and limitations.

Retaliation.—This, however, is the effect of the British Order-in-Council of March 11, 1915, adopted in retaliation for the German proclamation of a blockade of the British Islands by submarines. This last was itself declared to be in retaliation for the British treating provisions destined for Germany as contraband because the German Government had assumed to regulate all the food supply of the country, so that the ordinary rule of the civil population's supply obtained in the open market being free from interference was no longer applicable.

The Order recites that the German Government has issued certain Orders which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare; that in a memorandum accompanying the said Orders, neutrals are warned against entrusting crews, passengers, or goods to British or allied ships; that such attempts on the part of the enemy give to His Majesty an unquestionable right of retaliation; that His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though such measures will be enforced without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity; and that the Allies of His Majesty are associated with him in the steps now to be announced for restricting further the commerce of Germany; and declares:

I. No merchant vessel which sailed from her port of departure after March 1, 1915, shall be allowed to proceed on her voyage to any German port.

Unless the vessel receives a pass enabling her to proceed to some neutral or allied port to be named in the pass, goods on board any such vessel must be discharged in a British port and placed in the custody of the Marshal of the Prize Court. Goods so discharged, not being contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.

II. No merchant vessel which sailed from any German port after March 1, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port.

All goods laden at such port must be discharged in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into court, and dealt with in such manner as the Court may in the circumstances deem to be just.

Provided that no proceeds of the sale of such goods shall be paid out of court until the conclusion of peace, except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order.

Provided also that nothing herein shall prevent the release of neutral property laden at such enemy port on the application of the proper officer of the Crown.

III. Every merchant vessel which sailed from her port of departure after March 1, 1915, on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or Allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court,

upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.

Provided that this article shall not apply to any case falling within Articles II. or IV. of this Order

IV. Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin, or are enemy property, may be required to discharge such goods in a British or Allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the directions of the Prize Court. The proceeds of goods so sold shall be paid into Court, and dealt with in such manner as the Court may in the circumstances deem to be just.

Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace, except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order.

Provided also that nothing herein shall prevent the release of neutral property of enemy origin on the application of the proper officer of the Crown.

V. (1) Any person claiming to be interested in, or to have any claim in respect of, any goods (not being contraband of war) placed in the custody of the Marshal of the Prize Court under this Order, or in the proceeds of such goods, may forthwith issue a writ in the Prize Court against the proper officer of the Crown, and apply for an order that the goods should be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require.

(2) The practice and procedure of the Prize Court shall, as far as applicable, be followed *mutatis mutandis* in any proceedings consequential upon this Order.

VI. A merchant vessel which has cleared for a neutral port from a British or Allied port, or which has been allowed to pass having an ostensible destination to a neutral port, and proceeds to an enemy port, shall, if captured on any subsequent voyage, be liable to condemnation.

VII. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order.

VIII. Nothing in this Order shall prevent the relaxation of the provisions of this Order in respect of merchant vessels of any country which declares that no commerce intended for or originating in Germany or belonging to German subjects shall enjoy the protection of its flag.

This Order-in-Council applies only to neutral ships not carrying contraband, and not to such ships carrying contraband or enemy merchant ships; and its object is to restrict the trade of Germany and to establish a blockade to prevent vessels from carrying goods for or coming from Germany, but without the usual penalties attaching to a breach of blockade, and not interfering with neutral vessels carrying enemy cargo of non-contraband nature outside European waters, including the Mediterranean. The Declaration of the British Government of March 1 notified to neutral Governments gives the reasons for the measure.

It will be observed that the effect of (1) and (2) is equivalent to a blockade of Germany; but that (3) and (4) go further and if carried out would stop goods in neutral vessels going to neutral ports or coming from neutral ports which are of German origin or are enemy-owned or are destined for the enemy. In some respects the situation is more favourable for neutrals in that the penalty for carrying such goods is *nil* as against the ship, and the goods are only discharged and taken into custody and, if required, are requisitioned; while on the other hand it is more onerous in that a ship clearing under false pretences is liable to condemnation even on a subsequent voyage, wherever she may be, as compared with the conditions of blockade that neutrals cannot be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective, that there can be no blockade of neutral coasts, that whatever be the ultimate destination of the ship or cargo the ship cannot be captured if on her way to a non-blockaded port, and a ship breaking a blockade outwards or attempting to break it inwards is liable to capture only so long as pursued by a blockaded ship but not after the pursuit has been abandoned. It is a question whether (3) does not conflict with the Declaration of Paris that the neutral flag covers enemy goods except contraband, and it amounts to a reversion to the previous British prize law that enemy goods may be captured in neutral ships but the goods of a friend are exempt from capture in an enemy ship. No provision is made for the case of enemy subjects domiciled in a neutral country unless the expression "enemy subject" means a person domiciled in the enemy country. But there is no need to try to fit these provisions into any of the recognised formulæ of international law. It is clear from the words used by the Prime Minister that the measure is not intended to be one covered by existing international precedent: it is to create a position "free from juridical niceties"; and claims no justification beyond that of a measure of retaliation for the enemy's departure from the recognised practices of maritime warfare. It bears a close resemblance to action taken by our Government on two former occasions for a similar object in 1793 and 1807.

Precedents of Retaliation.—On the former occasion the National Committee in France had decreed that neutral vessels laden with provisions destined to an enemy's port should be arrested and carried into France, and in reprisal Great Britain detained all neutral vessels going to France with corn, meal, or flour. In a declaratory memorial to Denmark the British Government justified their action *inter alia* on the ground that the corn trade of France with foreign nations was no longer a mere private trade, but contrary to all custom remained in the hands of the National Executive Council and of the different municipalities, and it could no longer be considered as a mere combination of private speculations of which the individuals of other nations partake, but as a business immediately carried on by the pretended Government which had declared war on Great Britain. The Danish Government, however, made a protest, which has received universal approval as a master-

piece of reasoning, and was to the effect that the special circumstances afforded no justification for disregarding the rights of neutrals; and Phillimore, while admitting that the fact that the grain was purchased by the Government of France and taken out of the category of ordinary commercial speculation was entitled to considerable weight, is of opinion that the British claim was not warranted by international law. The United States also resisted the contention; and a treaty was concluded between Great Britain and the United States in 1794, which did not determine the question whether provisions could be treated as contraband, but admitted that they might become so according to the existing law of nations in certain undefined cases though they were generally not so, and provided for the judicial determination of any claims made by American citizens on account of irregular captures and condemnations of war vessels and other property made under the authority of the British Government. In 1795 (the former Instructions having been repealed) an Order-in-Council was made ordering British cruisers to stop and detain all vessels laden wholly or in part with corn, flour, meal and other articles of provisions and bound to any port in France and to send them to convenient ports in order that such goods might be purchased on behalf of the Government. This was afterwards withdrawn, but the seizures made under it were adjudicated on by the commission provided for by the treaty, and the British plea of necessity justifying the treatment of those articles as contraband under the circumstances was overruled and full compensation awarded.[1]

On the second occasion, in 1807, Napoleon had declared by the Berlin and Milan decrees that the British Islands were in a state of blockade and interdicted all intercourse with them by neutral States; and the British Government by the well-known Orders-in-Council declared all places in France, her allied countries, or countries which had submitted to Napoleon's restrictions to be blockaded.

United States proposed modus vivendi.—The United States suggested as a *modus vivendi* on the point of provisions being treated as contraband the following:

> Germany to agree that all importations of food or foodstuffs from the United States (and from such other neutral countries as may ask it) into Germany shall be consigned to agencies to be designated by the United States Government; that these American agencies shall have entire charge and control, without interference on the part of the German Government, of the receipt and distribution of such importations, and shall distribute these solely to retail dealers bearing licences from the German Government entitling them to receive and furnish such food and foodstuffs to non-combatants only, that any violation of the terms of the retailers' licences shall work a forfeiture of their rights to receive such food and food supplies for this purpose; and that such food and food supplies will not be requisitioned by the German

[1] See *The Zamora*, *Law Times*, June 26, 1915, p. 189, as to validity of Orders-in-Council.—Ed.

Government for any purpose whatsoever or be diverted to the use of the embarcation (*sic*) forces of Germany.

Great Britain to agree that food and food supplies will not be placed upon absolute contraband list, and that shipments of such commodities will not be interfered with or detained by British authorities if consigned to agencies designated by the United States Government in Germany for the receipt and distribution of such cargoes to licensed German retailers for distribution solely to the non-combatant population.

But Sir Edward Grey's reply made it clear that the British Government regarded this point as part of the policy found necessary to meet "the unprecedented methods repugnant to all law and morality which Germany began to adopt at the very outset of the war, and the effects of which have been constantly accumulating," and took the ground that "inasmuch as the stoppage of all foodstuffs is an admitted consequence of blockade, it is obvious that there can be no universal rule, based on considerations of morality and humanity, which is contrary to this practice. The right to stop foodstuffs destined for the civil population must, therefore, in any case be admitted if an effective 'cordon' controlling intercourse with the enemy is drawn, announced, and maintained. Moreover, independently of rights arising from belligerent action in the nature of blockade, some other nations, differing from the opinion of the Governments of the United States and Great Britain, have held that to stop the food of the civil population is a natural and legitimate method of bringing pressure to bear on an enemy country, as it is upon the defence of a besieged town. It is also upheld on the authority of both Prince Bismarck and Count Caprivi (in 1885 and 1892 respectively), and therefore presumably is not repugnant to German morality.

"The Government of Great Britain have now frankly declared, in concert with the Government of France, their intention to meet the German attempt to stop all supplies of every kind from leaving or entering British or French ports by themselves stopping supplies to or from Germany. For this end the British fleet has instituted a blockade, effectively controlling by cruiser "cordon" all passage to and from Germany by sea. The difference between the two policies is, however, that, while our object is the same as that of Germany, we propose to attain it without sacrificing neutral ships or non-combatant lives, or inflicting upon neutrals the damage that must be entailed when a vessel and its cargo are sunk without notice, examination, or trial."

NOTES ON CASES.

England.—*Aliens suing in a Corporate Name.*—The Nominalists and Realists of the Middle Ages would certainly have revelled in the point raised in *The Continental Tyre and Rubber Co., Ltd.* v. *Daimler Co., Ltd.*[1] Given a company registered in England, but with German directors and German shareholders only, can such a company bring an action in the Courts of this country to recover a debt due to the company? The full Court of Appeal, by five members to one, has decided that it can, and it would be presumptuous to criticise their ruling were it not for the strong disapproval of the decision expressed by both Lord Lindley and Lord Wrenbury—the two greatest living authorities on company law. We all know, of course, by this time that a company is a legal entity independent of the members who make it up. As such it may be liable for malicious prosecution,[2] for libel,[3] for assault and battery,[4] for fraud.[5] It may even be indicted and fined for breach of a statutory duty.[6] But this liability does not rest upon any imputation to the company of fraud, malice, or negligence residing in the mind of the company; for it has no mind. It rests upon the fact, that a company, being a mere abstraction, can act only by agents, and though the company has no eyes to see, or ears to hear, or will to act, its agents have all these things, and the company is answerable for their abuse, that is to say, the assets of the company are answerable. In short, a company is not a true legal *persona.* It is only a *nomen collectivum* for the members or shareholders—a puppet, the strings of which are pulled in a general way by the directors; on important matters by resolutions of the shareholders assembled in general meeting. Here—in these general meetings—is vested the supreme control of the company. These are the true company, the only means by which its so-called mind can be manifested. If this view is correct a company can owe no allegiance apart from that of the individual members who make it up. If those individual members, or a majority of them, are alien enemies, how is it possible that the company should be permitted to pose as a British subject because it is registered in England? As Lord Wrenbury points out, suppose the law allowed a single person to turn

[1] [1915] 1 K.B. 893 (C.A.).
[2] *Abrath* v. *North-Eastern Ry.* 11 App. Cas. 247.
[3] *Whitfield* v. *S. E. Ry,* E.B. & E. 115.
[4] *Butler* v. *Manchester, Sheffield, and Lincolnshire Ry.* 21 Q.B.D. 207.
[5] *Houldsworth* v. *City of Glasgow Bank,* 5 App. Cas. 317.
[6] *Reg.* v. *Birmingham and Gloucester Ry. Co.* 3 Q.B. 223.

himself into a company (as it now allows two), an alien enemy might, by registering, emancipate himself from all disabilities incident to his enemy status—a *reductio ad absurdum.*

Detention in Mine—False Imprisonment.—Our English jealousy of any restraint, or semblance of restraint, on the liberty of the subject has abated nothing from the days of Magna Charta. It is well illustrated in *Herd* v *The Weardale Steel Company.*[1] A miner had been lowered to his work in the coal-pit in the usual way at 9.30. Arrived there he quarrelled about the work assigned to him, threw down his tools, and demanded to be taken up the shaft to the surface. This was at 11 o'clock. The usual time for a change of shift would have been 4·30 in the afternoon. The cage at the time was idle, but the manager of the mine—perhaps not disinclined to punish the man for striking work—kept him waiting for half an hour before letting him go up to the surface. In respect of this detention—no doubt exasperating—the miner brought an action for false imprisonment. But did the detention under the circumstances constitute a case of false imprisonment? The Law Lords were quite clear that it did not. It was not as though the plaintiff had been consigned to the pit, like Joseph in the Old Testament, by his brethren. He had voluntarily put himself in the predicament in which he found himself by going down the pit in the cage under the terms of his contract, and he had no right either under his contract or under the Coal Mines Regulation Act of 1867 to be taken up except on the usual terms and at the usual hour—*volenti non fit injuria.* To the mind of the miner so delayed these refinements of the law present themselves, no doubt, as so much legal quibbling; but they are founded on good sense—the good sense embodied in Lord Bramwell's favourite aphorism, "Hold to your bargain."

Benefits for Animals.—In the history of charitable gifts we have a striking example of the transforming influence of judge-made law. Little by little the Statute of Elizabeth has been extended by the Courts—acting by analogy to the original objects of the statute—until it has come to comprehend whole classes of gifts never dreamed of by the lawyers and legislators of the sixteenth century. The latest illustration is to be found in *In re Wedgwood,*[2] a gift for "the protection and benefit of animals": in particular the more humane slaughtering of animals for food, and public abattoirs. Gifts in favour of animals have been allowed as charitable in many instances—gifts for the Prevention of Cruelty, the Abolition of Vivisection, a Home for Lost Dogs—but what is specially worthy of note in *In re Wedgwood* is that the Court of Appeal rest their decision, not on the benefit to the animals themselves, but on the good resulting to men—their masters. There is an innate tendency in man to cruelty, says the Master of the Rolls, and such gifts tend to promote public morality by checking the tendency. Lord Justice Swinfen Eady upholds them because they "tend to

[1] [1915] A.C. 67. [2] [1915] 1 Ch. 113.

stimulate humane and generous sentiments in man towards the lower animals, and thus elevate the human race." No doubt! We need education sadly in this matter. Even so good and kindly a man as old Isaac Walton could recommend in his *Compleat Angler* the use of a live frog by way of bait "as the longest lived thing on a hook." It is "want of thought" rather than "want of heart." But is man the measure of all things, as the Greek sophists held? Why should not animals have a right of their own to protection from abuse, like persons not *sui juris*. A distinguished French lawyer has developed this view and brought these "poor relations" of ours within the sphere of jurisprudence, assigning them proper juristic rights. Surely this is a better and a juster conception than that on which the Court of Appeal in *In re Wedgwood* have based their judgments.

Breach of Promise of Marriage and Executors.—What English lawyer but must blush in seeking to explain to the intelligent foreigner the English version of "actio personalis moritur cum personâ." Like other branches of our law, it has grown up in unmethodical fashion, adapting itself to the changing exigencies of society, a "wilderness of single instances," and nowhere are its perplexities better exemplified than in the action for breach of promise of marriage brought against the executors of a deceased promisor.[1] The gist of such an action is, of course, personal—the loss of the enjoyment of the amenities of married life; but the "grim Sergeant Death," as Chaucer calls him, has summoned away the perjured lover, and his offence dies with him—exemplary damages cannot be recovered against his estate. So much is certain. But if special damage be proved the action—we have it on the authority of the Court of Appeal[2]—*will* lie. The difficulty is to say what is "special damage." Lord Esher in that case suggested as an example the woman's having given up an employment or business in contemplation of the marriage. Now the very case he foreshadowed has arisen; in *Quirk* v. *Thomas* the lady plaintiff *had* given up a millinery business, by arrangement with her fiancée, in view of her expected marriage. Yet Mr. Justice Lush felt himself compelled to hold that such a sacrifice could not be treated as "special damage." "A contract by a man to marry," said the learned judge, "is not a contract of a commercial character." But—without any cynic smile at this assumption—is the marriage contract to be called "commercial" because it includes prudential considerations in regard of worldly matters—a collateral arrangement such as this of the lady giving up a business? And if not, why is the special loss not to be made good out of the promise-breaker's estate because the lady has been disappointed of her larger remedy? E. M.

Canada.—In Canada we look principally to the Privy Council to resolve the endless problems raised by the interpretation of the British North

[1] See *Quirk* v. *Thomas*, [1915] 1 K.B. 798.
[2] *Finlay* v. *Chirney*, 20 Q.B.D. 494.

America Act. The recent case of *John Deeree Plow Co., Ltd.*, v. *Wharton*[1] for the first time establishes the principle that the authority of the Parliament of Canada under s. 91 (enumeration 2) of the British North America Act, 1867, to legislate for the regulation of trade and commerce includes the incorporation of companies, the objects of which extend to the entire Dominion, and that a Dominion company, duly incorporated, is not to be prevented from exercising its functions by Provincial legislation. The whole question of the construction of s. 92 (sub.-s. 11) of the Act, which assigns to the Province the "Incorporation of Companies with Provincial Objects," was the subject of a recent reference to the Supreme Court by the Governor-General in Council,[2] and revealed wide divergences of judicial opinion.

The most recent decisions of the Supreme Court have not raised issues of fundamental importance. Mention may be made, however, of *Bélanger* v. *The Montreal Water Power Co.*,[3] which brought into sharp relief the divergent mentality of English and French jurisprudence with regard to stipulations entered into for the benefit of a third party. The respondent company was bound by contract with the municipality to maintain a specified capacity and pressure of water. In consequence, it was said, of its failure to do so the appellant's property had been destroyed by fire. His action for damages was held good in the Court of first instance—the Circuit Court in the Province of Quebec—but the Superior Court in review and the Court of King's Bench in appeal (both Provincial Courts) dismissed the action; and this view was ultimately sustained by the Supreme Court of the Dominion. Brodeur J. dissented, holding that an action lay both *ex contractu* and *ex delicto*. As to the first ground: "Ce principe de droit qu'on peut stipuler pour un tiers n'est pas reconnu dans le droit anglais, et alors il est excessivement dangereux de décider une cause comme celle-ci à la lumière de la jurisprudence de l'Angleterre." As to the second ground the learned judge relied on Art. 1053 of the Civil Code: "Toute personne est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabilité."

The occasional uncertainty of the law is illustrated by the case of *Pearson* v. *Adams*,[4] which came to the Supreme Court in appeal from the Appellate Division of the Supreme Court of Ontario. The sole question was whether a restrictive covenant that land was to be used only as a site for a dwelling-house had been infringed by the erection of a block of flats. An injunction was refused by the trial judge, granted by the Divisional Court (two to one), refused by the Appellate Division (three to two), and finally allowed by the Supreme Court (three to two).

R. W. Lee.

Australia.—A recent case in the Supreme Court of Western Australia affords an opportunity once more of pointing out that miscarriage of justice

[1] [1915] A.C. 330.
[2] Companies Reference, 48 S.C.R. 331.
[3] 50 S.C.R. 356.
[4] [50] S.C.R. 204.

should not at this time of day be allowed to occur merely by reason of an archaic form of procedure. It is time that in all parts of the Empire where the common law is in force the concurrent administration of common law and equity in the same Court should be adopted. The case above referred to is *Sinclair* v. *Schildt*.[1] In Western Australia the procedural fusion of law and equity as in England is in force, and no exception can be taken to the decision in that case. It does, however, serve to draw attention to the fact that a similar case in New South Wales was decided differently because "according to the practice of that State, in which the several jurisdictions of the Court are kept distinct, the plaintiff could only recover in equity." The New South Wales case is *Bagnall* v. *White*.[2] In each case the plaintiff sued for the monetary consideration due under a verbal agreement relating to sale of land, the agreement being one within s. 4 of the Statute of Frauds, though actually executed. In each case, in fact, defendant had been given possession of the land and refused to pay the price. In New South Wales the plaintiff failed because he sued in a Court administering common law only. In Western Australia the plaintiff succeeded because he sued in a Court administering common law and equity concurrently.

English Statutes Adopted in Oversea Dominions.—Nowadays an English statute is not often adopted *in globo* by an oversea legislature, but down to the middle of the last century it was a common practice for an oversea statute to declare in a few words that some particular English statute was in force in the Dominion—or Colony, as it usually was then. An illustration of the curious results that sometimes followed from this practice occurs in a case reported in the current volume of New South Wales Reports—*Gleeson* v. *Phelan*.[3] The question for decision was the validity of a devise of land in New South Wales to certain Roman Catholic religious orders. Against the validity of the devise reliance was placed on the provisions of the Roman Catholic Relief Act, 1829,[4] which made these orders illegal—if unlicensed. This statute was in the same year adopted in New South Wales by a local statute,[5] which declared the English statute to be in force in the Colony. After commenting on this unsatisfactory method of legislating, the judge who heard the case came to the conclusion that the statutes of 1829 did not prevent the devise being valid, since the local legislation could not effectively operate beyond New South Wales, and the devise was not merely in favour of religious orders within New South Wales. The provisions, therefore, of a statute of the United Kingdom could not be brought into play to render inoperative a device which would apparently have been—or, at all events, might have been—inoperative had the question been raised in the Courts of the United Kingdom.

J. E. H.

[1] [1914] 16 W.A.R. 100. [2] [1906] 6 S.R. 67, 4 C.L.R. 89.
[3] 15 S.R. 30. [4] 10 Geo. IV. c. 7. [5] 10 Geo. IV. No. 9.

South Africa.—The liability of owners of dogs for damage done by their animals was fully discussed by Gardiner J. in *Holmes* v. *Beest.*[1] The dog's nature as an animal *feræ naturæ* (otherwise than in English law with its consequential doctrine of *scienter*),[2] the consequent liability of the master for any damage done by his dog to a person who is lawfully upon the master's premises, and the absence of such liability for damage done to ostriches which had strayed upon defendant's land and had been chased by some dogs in the charge of defendant's servants, form the basis of this decision. The doctrine is not new,[3] and the case of straying ostriches had already been considered in *Drummond* v. *Searle*,[4] but the circumstances of the case gave the newly appointed Judge of the Cape Court an opportunity to review the whole history of the doctrine as followed in successive decisions in Cape Colony.

Alien Enemies.—Two other South African cases deserve attention. What is the position of an alien enemy? Is he to be considered as a hostage, a prisoner of war, or merely as a source of danger justifying precautionary measures? In *Ex parte Belli*[5] an application was made to the Cape Court by a German subject resident at Cape Town, who was exempt from military service in Germany as being medically unfit and who was not a reservist, against his arrest by authority of the Union Government and his removal by the same authority to confinement in Johannesburg. Martial law had, at that time, not yet been declared at Cape Town, and the applicant had, as a peaceful citizen, regularly reported himself to the Cape Town magistrate. Under these circumstances the applicant desired the assistance of the judicial power. The Court refused to interfere. It recognised that modern authorities plead the application of milder principles towards alien enemies, and quoted Halleck's words: "This extreme right, founded on the positive law of nations, has been stripped of much of its rigour in modern warfare by the milder rules resulting from the usage of nations, the stipulations of treaties, and the municipal laws and ordinances of particular States." But the Court could not overlook the existence of that positive right on the part of the Government which, according to the rules of international law, could in their absolute discretion act according to the necessities of war in seizing all subjects of a hostile Power within their territory and detain them as prisoners of war, while there was no positive rule of law which the Court could enforce to prevent the Government from exercising their discretion in the matter.

The second case is on a parallel with the decisions of the Court of Appeal in *Porter* v. *Freudenberg*, *Kreglinger* v. *S. Samuel & Rosenfeld*, *in re Merten's Patents.*[6] Who is an alien enemy? Can an alien enemy sue in the Courts of a hostile country? Can he be sued, and if so, what is the *modus operandi*? Gardiner J., who in September 1914 in *Ex parte Savage and others*[7] had to

[1] [1914] C.P.D. 708.
[2] See E. Manson, *The Law relating to Dogs*, London, 1893.
[3] See Maasdorp, *Institutes of Cape Law*, iv. p. 57.
[4] [1879] 9 Buch. 8.
[5] [1914] C.P.D. 742.
[6] [1915] 1 K.B. 857.
[7] [1914] C.P.D. 827.

decide these various points, laid down the same rules as have now been sanctioned by the Court of Appeal. Although the law has thereby been definitely laid down, it is still of interest to take notice of the reasons which led to the learned Cape judge's decision.

Having decided that the character of "alien enemy" is determined by residence in a hostile country, and that—in accordance with the rules of English common law—this involved a prohibition of any commercial intercourse between such alien enemies and persons resident in Cape Colony, the Court held that—unless and until special legislation was passed adopting the regulations laid down at The Hague Conference of 1907 (*inter alia*) "to declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings"—the common law rule involved a prohibition for an alien enemy to sue in a South African Court of Justice. The Court distinguished the decision in *Marks* v. *Thomson, Watson & Co.*,[1] where the plea was not raised in the pleadings and judgment went in favour of the defendants.

The same reasons, of course, did not exist for a prohibition of alien enemies from being sued in a civil action and defending themselves. As such would not be against public policy, it was held that an alien enemy could be sued in the Courts of the Colony.

The most interesting part of the judgment regards the *modus operandi* of the suing of the alien enemy. How is service of the writ to be effected? The English system of "substituted service" is unknown in South Africa. On the other hand, the Court was of opinion that service could not be effected by "edictal citation," as such publication would not likely reach the defendants in Germany. Recourse might be had to a form known in Roman-Dutch law of attaching some property within the Colony belonging to the defendants *ad fundandam jurisdictionem*, but the Court held that such was not necessary under the circumstances. The defendants were a German firm with headquarters in Berlin and branches in London and East London (Cape Colony). It was held that the summons directed against the firm might be served upon their manager at their place of business in the Colony, and that such service would be good service.

It is difficult to see in how far this mode of service differs from substituted service, and it seems that by a roundabout way the English form has thus been introduced into Cape practice.

Jurisdiction of Magistrates.—An interesting point regarding the jurisdiction of Magistrates' Courts in the Transvaal was decided in Pretoria by a Court consisting of De Villiers J.P. and Bristowe J. in *Rex* v. *Thompson*.[2] The point is "in itself a small one, but the principle involved is far-reaching." Has a magistrate power to decide on the validity of ordinances passed by a Provincial Council?

Questions whether regulations, proclamations, ordinances emanating from

[1] [1900] 17 S.C.R. 376. [2] [1914] T.P.D. 426.

the Executive, from municipalities, or Provincial Councils are *intra* or *ultra vires* are constantly recurring in South African law reports. If they relate to regulations or proclamations of the Executive power or ordinances made by a municipality on the strength of powers conferred upon them by some Ordinance or Act passed by a higher legislative body, the jurisdiction of the Magistrates' Courts has never been challenged. This is otherwise in the case of Provincial proclamations, or—before the passing of the South Africa Act—of legislative measures passed by the Colonial Parliaments. In 1848 [1] the magistrates were denied the right to challenge the legality of such legislative measures, and the decision then given has for years been observed as a precedent. Yet, as it was not given on a clear issue, the situation was not considered satisfactory and the question has been the subject of judicial observations in a number of cases.[2]

Recently Mason J. in a civil case, *Stanton* v. *Johannesburg Municipality*,[3] expressed his great doubt as to the correctness of the Cape decision. Shortly afterwards a clear issue on this point was raised in *Rex* v. *Thompson*. Opportunity was created by a decision of the Johannesburg magistrate in a criminal case, *Rex* v. *Sher*, which was upheld by the Pretoria Court [4] consisting of De Villiers J.P., Curlewis and Gregorowski JJ., when a Provincial Proclamation [5] regarding the Shop Act and its applicability to native eating houses was under consideration. This was within a few months followed by the magistrate's decision in *Rex* v. *Thompson* which tested the validity of the Transvaal Motor Car Ordinance, 1913. The Attorney-General, though admitting the correctness of both decisions, took advantage of the power conferred upon him by s. 43 of the Magistrates' Courts Proclamation,[6] and brought the question as to the extent of jurisdiction of a Magistrates' Court in matters of this kind on review before the Pretoria Court.

The Court decided in favour of the magistrate and founded their decision, not on any particular legislation, but upon the "general law," meaning thereby the magistrates' inherent jurisdiction on the general powers conferred upon him in criminal matters.[7]

The magistrates' criminal authority is very wide. It regards "all cases of crimes and offences wherein any person may be accused of any crime or offence not punishable by death, transportation, or banishment." Any statute conferring a particular jurisdiction confers also by implication all incidental and accessory powers and authorities which are necessary to the exercise of such jurisdiction.[8] That necessarily involves—in this case—the power to decide whether the Ordinance or supposed Ordinance under which

[1] *Municipality of Cape Town* v. *Morkel and de Villiers*, [1848] 3 M. 561.
[2] Cf. cases referred to by Bristowe J. in *Rex* v. *Thompson*, *loc. cit.* on p. 431.
[3] [1910] T.P.D. 742 on p. 756. [4] [1914] T.P.D. 270.
[5] No. 9 of 1903. [6] No. 21 of 1902.
[7] S. 35 of the Magistrates' Courts Proclamation, No. 21 of 1902.
[8] Digest II. 1, 2.

the accused was arraigned had any binding force. If the magistrate had not decided that point, he would have either had to refuse to entertain the case—which he could not do, as the case fell clearly under his jurisdiction—or to convict; but if he had convicted, he would have convicted an innocent man, for the Ordinance under which the conviction had to be pronounced was clearly and admittedly *ultra vires*.

Thus Mason J. expressed himself in *Stanton* v. *Johannesburg Municipality*: "A bye-law which is *ultra vires* must be considered as non-existent; it does not bind anybody, and if it does not bind a citizen or ordinary individual, I cannot understand how it binds a magistrate," who in the case of a criminal offence would "be compelled to convict a man when he knows he is not guilty, and that the upper Court must declare him not guilty."

"It may be," as Bristowe J. added, who read the judgment of the Court in *Rex* v. *Thompson*, "that there is some inconvenience in allowing magistrates to decide on the validity of statutes," but "considerations of justice must and ought to take precedence over considerations of convenience."

There is little doubt that the decision will be followed in civil matters where the subject-matter falls within the jurisdiction of a magistrate's Court.

W. R. B.

India.—In *Paul* v. *Robson*[1] the Judicial Committee has applied to a Calcutta case the principle laid down in *Colls* v. *The Home and Colonial Stores*,[2] and approved of in *Jolly* v. *Kine*,[3] that an obstruction to an easement of light or air is only actionable when it amounts to a nuisance. In Calcutta, where the centre and northern portions of the city are practically a mass of masonry, easements of air, and, possibly to a less degree, of light, are of considerable importance. Unfortunately the law in India is not now uniform on this subject. S. 28 of the Indian Easements Act, 1882, which applies to the Bombay and Madras Presidencies, to the United and the Central Provinces, and to Courg, has adopted the view, which was held by some Courts in England before the law was laid down authoritatively in *Colls'* case, that the owner of the dominant tenement is entitled to prevent any obstruction which diminishes to any extent the amount of light and air enjoyed by him. It would be well to amend the Easements Act.

Malabar Law.—Of late years considerable attention has been paid to the customs of the matriarchal systems prevalent in Malabar and Canara.

Besides the decisions of the Madras High Court and of the British Indian Courts in Malabar, there have been several decisions given by experienced Judges of the High Courts of the Native States of Travancore and Cochin. The result is that a consistent and definite law is gradually being established. There has been for some time a conflict as to whether the separate acquisitions of a female member of a *tarwad* (a joint family

[1] [1914] I.L.R. 42 Calc. 46. [2] [1904] A.C. 179. [3] [1907] A.C. 1.

governed by the matriarchal system) belonged to the *tarwad* or to a smaller body called the *tavazhi*, which consists of the woman's nearest heirs. A Full Bench of the Madras High Court in *Krishnan* v. *Damodaran* [1] now definitely settles the right of the *tavazhi* to such inheritance, although the self-acquisitions of a male member of the *tarwad* pass to the *tarwad*.

Rash and Negligent Surgery.—In addition to the physicians and surgeons who have been educated in medical schools upon English principles, and those who practise recognised methods of Oriental surgery and medicine, India contains a large number of practitioners whom we would describe in England as "quacks"—men having no technical education, and employing methods which are unscientific and dangerous. It is impossible, having regard to the comparatively small supply of properly educated practitioners, and to the views and habits of the people, to impose any statutory restrictions upon the practice of medicine and surgery, but where the act is rash and negligent, no care or precaution being taken, and death or hurt results, the criminal law can deal with the case.

In the *Emperor* v. *Gulam Hyder Panjabi* [2] the accused, who was a *hakim* (native physician), performed an operation on the complainant's eyelid. The instruments used were a pair of scissors and a needle, which would ordinarily be used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. The most ordinary precautions for the operation and for protecting the eyelid were neglected. The operation was needless and performed in a primitive way. The result was that the eye was injured. The magistrate convicted the accused of causing "grievous hurt" by a rash and negligent act under s. 388 of the Indian Penal Code. The Bombay High Court in revision said: "On these facts, it was quite open to the learned magistrate to find that the accused acted so rashly and negligently as to endanger human life or the personal safety of others. For where, as here, a *hakim* gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law." This seems to be good law. As technically "grievous hurt" was not committed, the High Court altered the conviction to one of causing simple hurt by a rash and negligent act, and set aside the sentence of imprisonment, but retained the sentence of fine.

E. J. TREVELYAN.

[1] [1912] 38 Mad. 48. [2] [1915] 17 Bombay Law Reporter 384.

REVIEWS.

WAR: ITS CONDUCT AND LEGAL RESULTS.[1]

THE arrangement of this book has apparently been determined by a desire to keep the work of the two authors separate, Parts I., II. (except one chapter) and III. being contributed by Professor Morgan and the rest of the volume by Dr. Baty. A clearer as well as a more logical and scientific presentment of the subject-matter would, however, have been attained, if the legal results of war had been examined and classified according as they are concerned with and affect the individual and the State. It is true that the conduct of war affects both State and individual, but the real legal relation is not between a belligerent State and the individual subjects of an enemy State or of a neutral State, but between the belligerent State and the enemy State or the neutral State, as the case may be. Thus the laws of war on land or at sea, and the laws of contraband and blockade, although they affect the person or property of the individual, are legally concerned only with the relations of States and are therefore branches of international law.

This being so, the contents of this book might conveniently have been distributed into two main parts on a basis of English municipal law and international law respectively. It is plain that Part I. (The Crown and the Subject), and Part IV. (The Subject and the Enemy) deal entirely with the effect of the war upon the legal position of all persons in the United Kingdom ("subject" being taken, for the purposes of these Parts, to include aliens who, through residence in this country, owe a local allegiance to the British Crown), a legal position which is regulated by municipal law, and these two parts might therefore have been grouped together and so grouped would constitute for the ordinary "plain man" in the United Kingdom a War Legal Vade-mecum, which, it is gathered from the Preface, it was the main intention of the authors to supply.

The second part, devoted to International Law, might then have been appropriately arranged as follows: Part II. (The Crown and the Enemy), Part V. (The Crown and the Neutral), Part III. (The Crown and its Treaty Obligations); whilst Part VI. (Miscellaneous), which deals with matters partly the subject of International Law (*e.g.* Chap. I., Commencement and End of

[1] *War: its Conduct and Legal Results* By T. Baty, D.C.L., LL.D., and J. H. Morgan, M.A. (London: Murray, 10s. 6*d*.)

War) and partly of Municipal Law (*e.g.* Chap. II., The Moratorium), might either have been retained in its present shape as a miscellaneous third part or else redistributed into appropriate places in the first two Parts.

Subject to this criticism as to the arrangement, the contents of this book should prove interesting and valuable both to lawyer and layman at the present time, though much of it, especially of the part contributed by Dr. Baty, is of a controversial character.

His contentions as to "British" companies wholly or chiefly alien in direction and capital will meet with considerable support, and he has treated the subject of trading with the enemy and cognate questions with considerable learning and insight. It may be questioned, however, whether he does not insist a little too strongly on American precedents. Practically every kind of commercial or financial transaction with the enemy which it is desired to stop is now a statutory offence under the Trading with the Enemy Act, 1914, and under s. 1 (2) of that Act the list of offences can be extended *ad lib.* by means of Royal Proclamations. The American cases are valuable as illustrations in any investigation of transactions which constitute the offence of trading with the enemy at common law, but owing to the legislation referred to the Courts are less concerned than in former days with the common law offence of trading with the enemy.

Professor Morgan's critical analysis in Part I. of the principal emergency legislation necessitated by the war is well worth reading, though in the case of the Defence of the Realm Acts and Regulations, his criticism has to a considerable extent been "spiked" by subsequent consolidation and amendment. It will probably be conceded by most champions of personal liberty that, whatever objections this legislation may be open to, it is an acceptable substitute for the full rigour of martial law. Similar legislation has been passed since the outbreak of war in other parts of the Empire, and indeed in the case of some Crown Colonies has been in existence for many years ready to be called into operation on an emergency by the proclamation of the Governor.

The parts of the book devoted to international law subjects are somewhat slight compared with those dealing with English municipal law, the latter occupying about 270 pages and the former only about 150, a disproportion which shows that the authors are chiefly concerned with the law affecting the individual in this country, and which seems to lend support to the rearrangement of the subject-matter advocated above.

Part III. was apparently intended originally to deal generally with the Crown and its treaty obligations—the passages inquiring into the binding force of the Hague Conventions might well have been brought into this part—but it consists of a single chapter on the neutrality of Belgium and Luxembourg by Professor Morgan. This, however, is not only of particular interest in connection with this war but gives a clear statement of the rights and duties of neutralised States and their guarantors generally. His chapter on the

laws of war on land (Part II.) is notable for its sidelights from the German War Book on Hague Convention No. IV. and the annexed Regulations.

Probably the part of Dr. Baty's short review of the law of neutrality (Part V.) which will attract most attention at the present time is that relating to the British Orders-in-Council retaliatory upon Napoleon's Berlin and Milan Decrees of 1806–7, and the attitude of Sir William Scott and later authorities towards them. Dr. Baty could not anticipate the methods which would be adopted in the German submarine "blockade" (so called) or he would probably have qualified his statement "sea warfare has never been as brutal as land war" (p. 212), but his discussion of the Orders of 1806–7 (pp. 358 *sqq.*) was a most "happy" anticipation of the British Retaliation Order-in-Council of March 11.

There are a few slips here and there (the title of the "Colonial Conference" (p. 134), for example, was changed to "Imperial Conference" in 1907), and the march of law is so rapid in these days of emergency legislation and its consequent judicial interpretation that even in the short time that has elapsed since the book was published the authors must have noted many points for reconsideration and revision in their next edition.

J. S. R.

WAR EMERGENCY LEGISLATION.

In Holland it is proposed to publish a series of volumes dealing with emergency legislation resulting from the present war in countries other than the Netherlands. In these the authors intend to give a systematic review of comparative legislation, not only of theoretical-historical, but especially of practical interest. By a similar arrangement and grouping of the various subjects of legislation it is their endeavour, in as complete a form as possible, to depict the important changes which have taken place in the legal world of the various countries in consequence of the extraordinary circumstances of the present day. The series opens with the German Empire.[1]

The authors divide their matter into three large groups, viz. (*a*) general provisions regarding constitutional problems; (*b*) provisions regarding legal relations in the interior; and (*c*) provisions regarding legal relations outside the country.

Under the first heading (*a*) they deal with the Imperial decree of July 31, 1914, declaring the German Empire to be in a condition of war, and the consequent transfer of all executive powers to the military authorities, the amendments of and additions to the civil and criminal law, and the applicability of the military criminal law. In connection therewith there is a consideration of the suspension of commercial treaties and also the influence of the war on the validity of the Hague Convention of October 18, 1906,

[1] *Foreign Emergency Legislation*: *The German Empire.* By A. Nicol-Speyer, LL.D., and Dr. C. H. Huberich. (The Hague: Martinus Nijhoff, 1915.)

regarding the prohibition to interfere with the mutual civil rights and rights of procedure of citizens of belligerent countries.

Under (*b*) are reviewed the legislative measures for the suspension of certain proceedings during the war, as to the bringing of actions and the execution of judgments, specially to shield persons who, on account of the war, are unable to protect their rights (Act August 4, 1914); also there are measures of the character of moratoria, suspension of the provisions of any statute of limitation, and measures regarding certain pledges and payments in gold. Further, this part contains amendments in the commercial and patent laws, the contracts of fire assurance and conveyance by railway, bills of exchange, and Stock Exchange transactions.

The provisions of a public nature include financial regulations, the issue of treasury bonds, the creation of special forms of loan institutions to the public (Darlehnskassen), and amendments regarding the issue of notes and gold and silver coins. There are also administrative measures, like the prohibition of exports, facilities regarding imports and transport by rail, police measures of an economical character regarding industrial problems, maximum prices, requisitions of stores, as well as measures of a social character like the assistance of soldiers' families, soldiers' pensions, women and child labour, and sick funds.

The third group (*c*), which occupies the smaller half of the book, relates to Prize Law and its administration in the Prize Courts. It deals with the Imperial Ordinance dated September 30, 1909, the "Prisenordnung," setting out the Prize Law, and the Imperial Ordinance dated April 15, 1911, the "Prisengerichtsordnung," setting out the procedure before the Prize Courts. Both ordinances adopt mainly the provisions laid down in the Declaration of London of 1909. Their publication dates from August 3, 1914, but until then it is surmised that none but the initiated knew of their existence.

W. R. B.

GENERAL INDIAN ACTS.[1]

A NEW edition of Statute Law may always be welcomed, provided that it is carefully prepared, like the seven volumes reproducing the General Statute Law of India, as contained in the unrepealed Acts of the Legislative Council of the Governor-General from 1834 to the end of 1913. They do not include the Acts which have been repealed, or general Acts of a purely private character, or Acts which are in force in so limited an area as to make their reproduction hardly necessary, or Acts which, although not actually repealed *in toto*, are practically a dead letter. Sundry important Acts, however, which can scarcely be said to affect so limited an area as to justify their exclusion—

[1] *The Unrepealed General Acts of the Governor-General in Council, from* 1834 *to* 1913. 7 vols. (Calcutta: Superintendent Government Printing, India, 1909–1914.)

such as, for instance, the great Bengal Land Acts of 1859, or certain Acts affecting the Bombay and Madras Presidencies (passed before the local legislatures were established in 1862)—are not reprinted in these volumes, because they are included in the local Codes.

The object of this, the fourth, edition is to exhibit (1) the General Acts still in force and which extend to the whole of British India, and (2) those which already extend to the greater portion of British India and *may* be extended to the rest of it, or which apply to the three Presidency towns. To the six volumes which were published in 1909 (including the first five Acts of that year) with a consolidated index has been added recently a seventh volume.

In reprinting older Acts the changes effected by later legislation are incorporated and explained by footnotes. For instance, by an Act of 1898 various changes were made in the Indian Penal Code of 1860: the changes dealt with the law of sedition, the promotion of enmity between classes, and statements conducing to public mischief. These alterations will be found in their places in the main Act which they amend. The footnotes also indicate where certain Reports, Debates, and Statements connected with the Acts can be found; these may be of use to the student and the practitioner, but these references may not be used judicially. The notes also contain references to other matters connected with the Acts, which will assist lawyers and other persons concerned with Indian law, its practice and administration. If the legal machinery is not as active as it has sometimes been, there is always plenty for the Legislative Department to do in keeping up to date the publication of the enactments contained in the various Codes of India.

THE BALUCHISTAN CODE.

British Baluchistan is the official designation of certain frontier districts which formerly belonged to Afghanistan, and were incorporated with British India in 1887; it constitutes a Province of British India and is under an Agent to the Governor-General, but is legally distinct from the Agency Territories, which also are politically under that officer. It had, in 1911, only 414,412 inhabitants, the population being very sparse. But even so small a portion of British India requires a legal equipment. This edition of the Baluchistan Code[1] shows (1) the general enactments in force in the Province, but without reprinting them indicates their places in the "General Acts" volumes, and (2) the local enactments in force, which are reprinted. The publication must have been facilitated by the *Regulation* of 1913, which consolidated and amended the Regulations declaring the law in force. The result is a handy little volume, but, as explained, it is not a self-contained

[1] *The Baluchistan Code, containing the Local Enactments in force in Baluchistan.* Third Edition. (Calcutta: Superintendent Government Printing, India, 1914.)

compendium of the whole law in force. The editing has not been carefully done. In the fifth column of pages 9 and 10 of the Chronological Table there are at least eleven incorrect references to subsequent pages of the book. This is a blemish in such a work. Every figure and detail should be rechecked, and *errata* published.

C. E. Buckland.

THE BILL OF LADING.[1]

The latest useful addition to the series of legal monographs which Cambridge University contributes yearly to the literature of law deals with a subject of general commercial importance with commendable succinctness and comprehension. The author makes the interesting suggestion that historically the bill of lading was evolved as a private contract for the shipment of goods between the merchant and the shipowner from the ship's register, which was the record of the goods shipped kept by the ship's clerk, and probably itself took the place of an oral contract. The custom of merchants made the property in the goods and the contract transferable by indorsement of the bill which was expressed to make the goods deliverable to a particular person or his order or his assigns. This doctrine was adopted by the common law, so that to a certain extent the instrument became negotiable. But in our own law, except for the purposes of the Factors Acts (viz., in order to facilitate transactions by mercantile agents entrusted with documents of title to goods), and to defeat the right of an unpaid vendor to stop goods *in transitu* to an insolvent consignee, the bill of lading has never become negotiable in the same way as the bill of exchange, for the title of the transferee has remained limited to the extent of the title of the transferor. The indorsement does not do more than assign the right to receive the goods, and the bare indorsement does not affect the property in them; its effect depends on the intention of the parties.

The supplementary chapters on the position of the bill in the foreign systems serve the useful purpose of enabling a comparison to be made between our conception of it and theirs. Most of them adopt the same forms as our law, and the issue of a number of copies of the bill. One salient point of difference may be noted. The French law, which, like our own, is comparatively an older system, takes a similarly restrained view of the bill as a negotiable instrument by indorsement. It gives the preference in title to the goods to the first indorsee in point of date, though they be actually delivered to a later indorsee; and it recognises a *droit de revendication* corresponding to our stoppage *in transitu* in favour of the goods owner. On the other hand, the more recent German, Scandinavian, and Japanese

[1] *The History and Present Position of the Bill of Lading as a Document of Title to Goods: being the Yorke Prize Essay for the year* 1913. By W. P. Bennett. (Cambridge University Press, 1914.)

codes seem to aim at assimilating the bill to a bill of exchange, and making it a negotiable instrument by allowing a good title to be transferred to a *bonâ-fide* transferee by a transferor whose title is defective (*e.g.*, who may have stolen or only found the bill). They give the property in the goods to the holder of a copy of the bill who first obtains delivery, and they give no right corresponding to that of stoppage *in transitu*. The law of the United States, though similar to our own as regards the common law, also shows a tendency in the modern legislation of certain States (the Uniform Bills of Lading Acts), to give the bill of lading the character of a negotiable instrument and discard stoppage *in transitu*, by allowing a *bonâ-fide* transferee to acquire a good title from a transferor with a defective title. The account of the comparative law of bills of lading may be supplemented by a reference to the attempt made some years ago at the instance of the International Law Association to formulate a skeleton form of the instrument for general application (the London Rules of Affreightment), on the analogy of the York-Antwerp Rules for general average, which, however, achieved no practical result. The author may be congratulated on having given a lucid and well-balanced exposition of the whole subject.

G. G. P.

LOWELL ON GOVERNMENTS AND PARTIES.

President Lowell's work on *Governments and Parties in Continental Europe*, published in 1897, has long been recognised as authoritative, and the present abridgment of that book,[1] which was made in order to meet the needs of college classes, has all the merits of its predecessor. Dr. Lowell is not only an authority on the constitution of his own country, but he has shown himself worthy to rank with the leading authorities on the working of the British constitution, and his thorough knowledge of the structure of the most perfect examples at the present day of a unitary parliamentary government and a federal system stands him in good stead whether in explaining the reasons why the French parliamentary system is in effect so different from the British or in bringing out the extraordinary characteristics of the quasi-federal constitution of the German Empire. He is equally successful in explaining the essence of the legal construction of the government and in illustrating the fundamental features of its working. Short as the book is, it would be difficult to point to anything of importance which has been omitted, and the exemplification of the theory is most skilful and interesting. The account, for example, of the German Bundesrath (pp. 191-205) is a model of clearness and condensation.

It was not to be expected or desired that in a work, which is admittedly intended to be an abridgment, the author should revise the opinions which

[1] *The Governments of France, Italy, and Germany.* By A. Lawrence Lowell, President of Harvard University. (Cambridge: Harvard University Press, 1914.)

he formed some seventeen years ago, or alter the citations of authorities on which his exposition rests. A certain amount of revision has, however, been given to the book in order to adapt its statements to the changes made by legislation since the parent work appeared. Occasionally also statements have been altered to meet the new situation of events after a lapse of so many years, but it is clear that this revision has not been carried sufficiently far to avoid incongruities. Apart from the fact that here and there (*e.g.* pp. 201 and 205) references to the old edition are allowed to stand unaltered, it is confusing to be told that the national codes of Germany were completed this year (p. 214), to learn that the House of Lords does not venture "to reject any measure on which the Cabinet is really in earnest, unless perchance, as in the case of the recent Home Rule Bill, it is convinced that the House of Commons does not fairly represent the people" (p. 5), to be told of the late ministry of Lord Rosebery, and of Mr. Dalziel's motion in 1895, in favour of the second ballot, as taking place just at this time (p. 87). What is more important is that the young student is left from his knowledge of recent European politics to modify the results arrived at by Dr. Lowell on such important questions as the position of the German Chancellor towards the Reichstag and of the Roman Church towards the Italian State, both questions on which he would doubtless much prefer the President's sure guidance. It is also to be regretted that so excellent a work should be issued without an index, which it fully deserves, and for which space might have been found by the omission of the long note (pp. 65-8) on the views of Gneist on the British constitution, which in itself is somewhat out of proportion in its present position.

A. B. K.

MOTHERS' PENSIONS.

In the last number of the Journal[1] Mr. Newton Crane gave some particulars of the Mothers' Pensions laws, which are now in operation in States embracing half the population of the United States, so that it is unnecessary to do more than direct attention to a publication[2] containing the text of the various laws issued by the Children's Bureau of the Department of Labour. In addition to the text of the laws of the twenty-one States where some arrangement is made by legislation to secure for young children home life and the personal care of a good mother, the Bulletin contains also the particulars of similar laws in New Zealand and Denmark. The primary object is to enable the mother, deprived of a husband's support, to fulfil her maternal duties without the necessity of leaving the home to earn a living for herself and her children.

[1] "Review of Legislation, 1913," pp. 156-7.

[2] *Laws relating to "Mothers' Pensions" in the United States, Denmark, and New Zealand.* (Washington: Government Printing Office, 1914.)

THE GOVERNMENT OF INDIA.

THE first edition of this work[1] was published in the year 1898, and the second in 1907. In the years 1910 and 1913 supplements were published, setting forth the far-reaching changes resulting from Parliamentary legislation of 1907, 1909, 1911, and 1912. In August, 1907, reductions were made in the number of members of the Council of India, the salary of members, and their term of office. In 1909 the legislative councils in India were enlarged, their constitution was changed so as to introduce a wider system of election, and their power to transact non-legislative business was extended; and provision was also made for the constitution of executive councils for Lieutenant-Governors. In 1911 the maximum number of judges of the High Courts was increased, definite power was given to establish new High Courts, and the Governor-General in Council was empowered to appoint additional judges to High Courts for periods limited in each case to two years. In 1912 the powers of the newly appointed Governor and Council for Bengal were definitely assimilated with those of the Governors and Councils of Madras and Bombay, and power was given to create legislative councils for Chief Commissioners. These important changes suggested the issue of the present edition of Sir Courtenay Ilbert's book, which embodies the two supplements and makes further additions and alterations to bring the book up to date. The explanatory chapters contain much valuable information, not readily obtainable elsewhere; but the main value of the book to the practical administrator or legislator lies in Chap. III., which contains a digest of a large number of statutory enactments relating to the government of India. This digest has been framed with admirable skill and accuracy. It reproduces in 125 sections those portions of 45 Acts of Parliament, comprising some 450 unrepealed sections, which are now in practical operation, and portions of three other Acts. These 48 Acts if bound together, would fill a volume of some 520 pages, and they have never been published with any such annotation as would make it safe to use them without a great deal of research, in the absence of a digest of this kind.

The digest has long been a standard work of reference to the various Governments and Legislative Councils in India, and is indispensable to other persons, whether in India or in England, who have occasion to deal with Indian administrative law. It forms the basis of the Bill which has been introduced by Lord Crewe in the House of Lords for consolidating enactments relating to the government of India, and the present edition of the book should be most helpful during the discussion of the Bill in Parliament. The Bill is the latest of a series of attempts, made during the last forty

[1] *The Government of India.* Being a Digest of the Statute Law relating thereto, with historical introduction and explanatory matter. By Sir Courtenay Ilbert, G.C.B., K.C.S.I. Third Edition. (Oxford: Clarendon Press, 1915, 14s.)

or fifty years, to re-state with authority the tangled mass of Parliamentary legislation, now ranging over a period of 142 years, under which the vast territories of India are governed. That legislation includes many provisions which have from change of circumstances become more or less obsolete or obscure, and many which are overlapped or to some extent superseded, though not expressly repealed, by later provisions ; and the necessity for consolidation is overwhelming. If, as is earnestly to be hoped, the Bill becomes law, the relief to overburdened officials in both countries of having a concise modern Act to work under, instead of a loose mass of statutory provisions, presenting grave difficulties of construction, will be enormous. The substitution of precision for vagueness, of order for chaos, of a readable and comparatively short Act for a mass of scattered provisions often mutually conflicting, will also necessarily tend to the better administration of the law.

F. G. Wigley.

THE CARE OF CHILDREN.[1]

The welfare and happiness of children are engaging the attention of so many varieties of social workers, local officials and governing authorities, that some words of information might have been given by Mr. Holland as to the reader whom he had in mind in writing a book dealing with the law relating to the child.[1] Without some prefatory guidance of this character it is difficult to discern the reason for the publication of another summary of the law contained in the statutes and cases, when there are at least two reliable books of similar scope. The feature of Mr. Holland's work is an introduction in which he sets forth some of the leading laws relating to the welfare of children in Spain, Germany, France and Italy, and a useful bibliography of German, French and English literature. He notes as a feature of Continental legislation that the protection of child-life is regarded as a matter of military necessity, so that in Spain, for example, "the minister of war is in most cases the person responsible for the promulgation of regulations and the carrying out of the law in this respect." In England, however, Mr. Holland desires to see all the matters affecting the welfare of children gathered together under the protection of one central authority specially devoted to them. The careful summary of the law which he has compiled cannot do justice to the amount of correlation which exists in its administration, since it is concerned only with the text of the legislation. The Government Departments have in several instances been taking practical steps to unite and co-ordinate their efforts, and recent developments in that direction justify the belief that, judged by results, this country does not compare unfavourably with others in its care of the coming generation.

[1] *The Law relating to the Child, its Protection, Education and Employment.* By R. W. Holland, M.A., M.Sc., LL.D. (London : Pitman & Sons. 5s.)

PROFESSOR DICEY ON THE LAW OF THE CONSTITUTION.[1]

THE new matter in this, the eighth, edition of Professor Dicey's standard work will be found in the Introduction which, while consisting mainly of historical retrospection, contains searching criticisms on such topics as the Sovereignty of Parliament, the Rule of Law, the Law and Conventions of the Constitution, New Constitutional Ideas, and some general conclusions. The Parliament Act of 1911, reproduced in an Appendix, presents the latest and greatest developments. Professor Dicey considers that "it has greatly increased the share of sovereignty possessed by the House of Commons, and has greatly diminished the share thereof belonging to the House of Lords," "goes some way towards establishing in England a written, or, more accurately speaking, an enacted constitution," "greatly restrains, if it does not absolutely abolish, the use of the royal prerogative to create peers for the purpose of swamping the House of Lords," and "enables a majority of the House of Commons to resist or overrule the will of the electors or, in other words, of the nation." He notes a singular decline among modern Englishmen in their respect or reverence for the rule of law. The tendency of the new Conventions of the Constitution is, he thinks, to increase the power of any party possessing a parliamentary majority, and to place the control of legislation in the hands of the Cabinet. He has much to say, of great interest, of the new constitutional ideas, developed during the last thirty years, on Woman Suffrage, Proportional Representation, Federalism, the Referendum—giving the arguments on both sides and his conclusions. An Imperial Constitution, he fully believes, based on good will and fairness may within a few years come into real existence; he regards it as in the highest degree improbable that Home Rule all round, or the federal solution, will be of any benefit whatever to any part of the United Kingdom. Whatever Professor Dicey writes must be carefully considered by students of the Constitution.

C. E. BUCKLAND.

WESTLAKE'S COLLECTED PAPERS.

THIS substantial volume[2] contains the late author's *Chapters on International Law* together with some twenty miscellaneous papers (produced between 1856 and 1913), which represent lectures, articles contributed to legal and other reviews, letters to *The Times*, etc., on important matters of public international law. There is also the editor's lucid and sympathetic introduction, comprising preliminary observations and a brief estimate of Westlake's work and character, which had already been published by Professor Oppen-

[1] *Introduction to the Study of the Law of the Constitution.* By A. V. Dicey, K.C., Hon. D.C.L. Eighth Edition. (Macmillan, 1915.) 10*s.* 6*d.* net.

[2] *The Collected Papers of John Westlake on Public International Law.* Edited by L. Oppenheim, M.A., LL.D. (Camb. Univ. Press, 1914.)

heim in the *Cambridge Review*. The re-issue of the *Chapters*, first published in 1894, occupies nearly half of the volume. It is simply a reprint and not, properly speaking, a second edition, which, had the author lived, would undoubtedly have been considerably modified. In the interval of twenty years numerous substantial changes have been made in the regulative body of international law, and much light has been thrown on its historical development. Westlake's papers contributed to the *Revue de droit international* are not included, for the reason that the French review "is in the hands of all those interested in international law." But this journal is not more accessible to students than, say, the *Law Quarterly Review* or the *Journal of Comparative Legislation*, from which a portion of the present volume has been drawn. It would perhaps have been better to publish separately a second edition of the *Chapters*, together with footnotes indicating recent changes and giving appropriate references to the author's larger treatise on the law of peace and war; and in its place to put some of the principal contributions to the *Revue de droit international*.

The *Chapters* is avowedly devoted to an exposition of the principles of international law, and is not intended to be a systematic treatise on the subject. This being so, it is to be regretted that very little more space is given to setting forth the law of war than to the account of the position of India with regard to international law and constitutional law, which is hardly connected with the fundamental principles of the law of nations. Various other matters to which reference is made, and which serve as the grounds of argument, are now out-of-date, so that explanatory footnotes, at least, were most desirable from the point of view of students in general. Thus on p. 250, where coast-fisheries are referred to, a reminder is necessary of the Hague Convention (1907), No. XI. Art. 3, to show that a definite advance was made since 1894—especially so, in view of the occurrences of to-day. Again, the allusions to the draft declarations of the Brussels Conference have now only an historical interest, in view of the express provisions laid down by the later International Conferences of the Hague and the Naval Conference of London. The historical section is distinctly inadequate; it needs revision and a good deal of filling out to show more clearly the gradual evolution of the subject and the different contributions made to it by jurists, councils, and treaties. On p. 17 we read: "The Greek mind . . . never busied itself with law." This is a startling pronouncement to meet with at this time of day, in view of the records of Hellenic legislation, the numerous private codes, and a wealth of extant documents illustrating the regulation of interstate relationships, etc. Next, the big jump from Isidore of Seville to the Renaissance and Suarez passes over important stages in the stream of juridical evolution. Then we are informed that Gentilis was inferior to Ayala in dealing with principles; "nor was Gentilis a man from whom any assistance could be hoped in mitigating the ferocity of war." On the contrary, Gentilis reveals a mastery of principles, and also was in advance of

his time in condemning a large number of rigorous practices and advocating numerous relaxations, many years before Grotius. Thus (as has been shown in this Journal in an article reprinted in the *Great Jurists*) he condemned perfidious conduct, the useless destruction of temples, the devastation of fields, attacks on *res innoxiæ* in general, especially sacred objects, works of art, libraries, manuscripts, the ill-treatment of the inoffensive population; he contended that hostages ought not to be punished for their countrymen's breach of faith, that prisoners should not be put to death (but ought, rather, to be exchanged), that the infliction of monstrous and cruel punishments is barbarous, that the granting of letters of marque is an odious practice, and, generally, that "æquitas" is to be preferred to "ius strictum" and "honestas" to "utilitas." However this may be, Chap. VI. presents an excellent statement of the criteria whereby the fitness of rules is to be tested; and Chap. XI. contains an examination of the German doctrine of military necessity, of the mischievous and unjustifiable distinction between "Kriegsmanier" (the ordinary rules of war) and "Kriegsraison" (what is exceptionally permitted)—the calamitous results of which distinction the world has already witnessed in these days.

The miscellaneous papers deal with several important questions of immediate interest, *e.g.* blockade, contraband of war, and whether a neutral Government is bound to prevent its export, continuous voyage, the relation between international law and English law (which is important in view of the jurisdiction assumed by the Prize Court), the Hague Conferences (where reference is made to the subtle arguments and professions of the German representative in regard to submarine mines), reprisals, belligerent rights at sea, the Declaration of London. Space does not permit an estimate in detail of all these contributions, which have done much to help the moulding of modern international law. Throughout the author insists that international law is *law* in the rational sense of the term; he rightly gives to the expression a wider and truer significance than that accorded to it in the abstract Austinian analysis; he recognises and insists on the dynamic forces in the society of states and therefore emphasises the organic character of any legal code applicable to that society.

Westlake's main strength lay in the analysis of complex conditions, the crystallising of principles therefrom, and the inferring of conclusions in accordance with the conceptions of right, justice, harmony. His style and general treatment are characterised by exactness and studied carefulness of expression, cogency of reasoning, and judicial balance; but there is little of that personal, intimate element which permanently endears literary productions to students, and makes them not only a fund of information but a source of inspiration. It may, however, be unreservedly said that the writings of Westlake give him an eminent position among the modern international jurists.

C. P.

THE INSURANCE LAW OF JAPAN.[1]

THE translation of the Japanese law of insurance business by Mr. De Becker, the exponent in English of the Japanese Civil Code, is a fresh contribution to the theoretical and practical study of comparative jurisprudence.

The Japanese legislator has divided insurance laws into two parts—viz. the laws regulating the rights and liabilities of the insurer, the insured, and the beneficiary, and the laws comprising the rules to be observed by the companies, together with their Government supervision. The former part of the insurance laws—the substantive insurance law, it may be called—is comprised in the Commercial Code of Japan, 1899. Articles 384 to 433 of the Code deal with the general principles of insurance against loss, fire insurance, transport insurance, and life insurance. Articles 653 to 676 deal with marine insurance. The latter part—the law of supervision of the insurance business—is the subject of which the translation is now accomplished by Mr. De Becker. Although the author of this book calls it "the Insurance Law of Japan," yet he carefully adds to it the original Japanese title "Hokengyō-Hō," which means literally "the insurance business law," as contrasted with the substantive insurance law.

In this "insurance business law" the Japanese legislator has adopted the principle not to allow a private concern to carry on the insurance business, as its capital is susceptible to losses from various external circumstances. The insurance business may only be carried on by a joint-stock company or a mutual company. For the same reason such companies as are licensed to carry on the insurance business are prohibited from pursuing any other additional business; and the same company may not at the same time have for its object life insurance and insurance against loss. The general rules about the joint-stock company are comprised in the Commercial Code above referred to, only some special provisions being contained in this law of insurance business. Among these special rules concerning joint-stock companies is the section imposing on such companies the obligation to have the capital of at least 100,000 yen (£10,000). The laws relating to mutual companies are exclusively contained in the present law of insurance business. Articles 26 to 91 deal with formation of the mutual company, rights and liabilities of its members, alteration of the articles of association, termination of membership, dissolution, liquidation, and supplementary provisions. As to the method of supervision, both on the joint-stock company and mutual company carrying on the insurance business, the competent authority (which, under the present Government organisation, is the Minister for Agriculture and Commerce) is authorised to issue such orders as may be necessary to compel obedience to the provision of this law, especially to require the company to report on its business, to examine into its affairs,

[1] *The Insurance Law of Japan.* Translated from the original Japanese text by J. E. de Becker, solicitor. (Kelly & Walsh, Yokohama, 1914.)

or the state of its property. Besides, should the Minister deem the state of an insurance company to be such as to make it difficult to continue its business, he may order that the company's property be deposited or its business be suspended, etc.

It will not be quite out of place here to add one or two words about the development of the insurance business in Japan. Although as far as three hundred years back, Japanese navigators had a system of mutual maritime insurance, and the Japanese people knew a system resembling that of the German "Sterb-Kasse," yet the practice of the modern insurance is of very recent origin. The first marine insurance company organised in Japan was "the Tokyo Marine Insurance Company," constituted rather more than thirty years ago; and the rudiments of the modern life insurance could be traced to the formation a few years later of an association among the employees of the "Mitsubishi" (a big firm engaged in shipping, banking, and mining). The former carried on business on the basis of the Lloyd's policy, while the latter adopted the "seventeen offices table" for the foundation of the calculation. Thus in both marine and life insurances, there is a close resemblance between English and Japanese methods. But the boom of the Japanese insurance business, especially fire insurance, came only after the Chino-Japanese War, 1895. But later a considerable number of insurance companies failed and public opinion was aroused demanding more stringent supervision over such companies, with the result that the present law of insurance business was passed in 1900.

Mr. De Becker has accomplished with success the difficult task of translating the Japanese text of the law into English. In view of the fact that there are twenty-three English fire and marine insurance companies and eighteen life insurance companies now carrying on their business in Japan, this translation should have a practical value to them, as well as an interest to students of comparative jurisprudence.

I. Kiyosé.

STATUTORY RULES AND ORDERS, BENGAL.[1]

Rules and Orders are required to be issued under the various classes of laws in force in India (ranging from Statutes and Acts to Regulations) for at least two reasons: firstly, it is impossible and undesirable to provide, in the clauses of each enactment, for all the detailed points which it covers; secondly, it can be provided that Rules may be changed, by proper authority, to suit varying conditions without the necessity for fresh legislation. If the Rules seem sometimes to go into too much detail, the explanation is that

[1] *The Bengal Local Statutory Rules and Orders*, 1912. Being lists and a collection of extant local Rules and Orders made up to March 23, 1912, under enactments applying to the Province of Bengal as constituted on that date. By F. G. Wigley, C.I.E., Barrister-at-Law. 3 vols. (Calcutta: The Bengal Secretariat Book Depot, 1914. Rs. 13; 19s. 6*d*.)

in a country like India it is necessary to be quite clear as to the requirements of the laws: rightly or wrongly the people have come to expect to be told minutely what the laws mean and to dispute what is not expressly stated.

In pursuance of the general principle (which has been previously insisted upon) that the law (including Rules and Orders in force under it) should be easily accessible, Mr. F. G. Wigley, while Secretary to the Bengal Legislative Council, compiled laboriously, with skilled assistance, lists and collections of the Rules and Orders in force in Bengal on a certain date. All these Rules and Orders must have appeared some time or other in official Gazettes—corresponding generally to the *London Gazette*. These Gazettes have an historical interest in connection with the progress of journalism in India. In 1780 there was a newspaper named the *India Gazette*, and in 1784 the *Calcutta Gazette and Oriental Advertiser* was a weekly semi-official journal under the avowed patronage of Government. The official part was kept separate from the editorial, but the Government used it as a medium for making known general orders, requisitions, and official notifications of all sorts, issued by authority. Several volumes of *Selections* from the *Calcutta Gazette*, published fifty years ago, contain many specimens of the official orders of the time. But in May 1815 the Government established the *Government Gazette* for the public service, withdrawing official authority from the (then) *Calcutta Gazette*. Since that date official Gazettes have been established by the Government of India and the Local Governments for the publication of nothing but official documents, appointments, Acts, Bills, proceeding of the legislative councils, resolutions, despatches, and advertisements of official books and papers. These official Gazettes are recognised in the Courts as authoritative. Sometimes they are the subject of humorous criticism. "Rubbish shot here" was suggested as an appropriate motto, and a cynical lawyer described one of the Gazettes as the Government *Punch*.

It is from these official Gazettes that Mr. Wigley has extracted the materials, therein buried, for his work. It supersedes and enlarges upon a previous compilation of a similar character. It is supplementary to the volumes of reprinted laws. It contains matter only applicable to Bengal at the date specified. The first volume contains lists of the Rules and Orders, classified according to the class of laws under which they were issued, and arranged chronologically. The Gazette, Manual, or other publication in which the Rules, etc., have appeared is clearly shown. In the second and third volumes many of the Rules, etc., noted in the first volume are printed *in extenso*.

But Mr. Wigley is also at pains to show in what respects his work is admittedly incomplete. For instance, General Statutory Rules, etc., in force in other provinces as well as Bengal are excluded, as they have already appeared in another work: nor has he examined the *Calcutta Gazette* previous to 1884, or the *Gazette of India* at all. But he has collected

materials from sources so prolific that for practical purposes the three volumes are fairly complete; and the index and references provided will enable any lawyer to trace the Rules *in extenso* where the author has refrained from publishing them at length. If the number of *Corrigenda* appears large, it affords evidence of the meticulous care required to produce such a work. It has been said that, next to knowing a thing, the best thing is to know where to find it. Mr. Wigley's volumes will afford all the assistance possible to any lawyer, or secretary, in finding what he wants to ascertain. There should be no difficulty in keeping it up to date and filling any gaps that may be revealed.

C. E. BUCKLAND.

PRIVATE INTERNATIONAL LAW.

DR. BATY'S book[1] is an expansion of three lectures. To works like those of Westlake, Dicey, Foote it will prove a valuable supplement. The author subjects the judgments pronounced in various cases to a critical examination, and by acute analysis disengages their underlying foundations, whose validity he tests in the light of general principles. Some of the arguments of the late Prof. Westlake meet with forcible replies. Indeed, Dr. Baty is nothing if not critical; and he is even rebellious. "It is always a source of pleasure," he says, "to break established conventions, and the present convention being to treat every subject historically, I shall venture to do nothing of the kind" (p. 7). The historical method is simply indispensable to those who would obtain accurate conceptions of modern jurisprudence, and especially to students of private international law. Even a brief historical introduction would have shed a flood of light on the complexities of the subject, and would emphasise the fundamental problems that this fascinating science is called upon to solve.

Thanks to the original lecture form, the substance of the book is brightened by a certain absence of formality attaching to systematic treatises. For example, speaking of Westlake's theory which restricts the operation of the principle of domicile, Dr. Baty says: "It appears to me to rest avowedly on a tissue of assumptions—a gossamer fabric of fancy woven of a warp of hypothesis, shot with a woof of ancient history" (p. 23). Again: "Such an all-embracing system, surrounding a stranger like an atmosphere of musk or sandalwood, is an ideal abstraction, like the planes and lines of geometry" (p. 17). (We shall not insist on the mixture of figures.)

Numerous complicated problems involving the notion of domicile are discussed in the first two lectures, but the explanation of "domicile" itself is reserved to the third. It would, clearly, have been better, in the interest of logical sequence and development of doctrine, to put the substance of the

[1] *Polarized Law.* By T. Baty, LL.D., D.C.L. (Stevens & Haynes.)

first portion of Chap. III. earlier in the work, if not at the beginning—especially so, as after a rather inadequate account of domicile in prize-law, and trade domicile in war, the chapter suddenly changes—and without the way being prepared for it—to a discussion of the Hague Conventions on private international law, with which discussion the preceding observations on domicile have no connection. Had the criterion of domicile and the opposing one of nationality been made very clear, certain defects in expression would probably have been obviated.

Notwithstanding these small defects the book is a desirable addition to the scanty English literature on the subject. The account of the Hague Conventions (little known in this country) on private international law is of great value, as is also that of the various foreign theories.

C. P.

THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND.[1]

This is not a law-book in the ordinary sense, though it deals with law and sundry cases: nor is it meant primarily for practising lawyers, though they may occasionally derive advantage from consulting it. It is, in fact, a treatise on the laws of a certain period regarded from a particular point of view. In the first edition of 1905 Mr. Dicey mentioned that he had, in 1898, delivered in the Law School of Harvard University a series of lectures tracing out the relation during the last hundred years between the progress of English law and the course of public opinion in England. These he utilised in lectures at Oxford and has reproduced, rewritten: in a second edition thereof he has prefixed a new Introduction, the object of which is to trace and comment, by analysis, conjecture, and criticism, upon the rapid changes in English law and in English legislative opinion which have marked the early years of the twentieth century. Altogether, Mr. Dicey's aim is to examine the connection or relation between a period of English legislation and public opinion in its main stream and its successive and counter-currents. He never loses sight of his principle that legislation and public opinion act and re-act upon one another alternately as cause and effect. Though he does not profess to be writing a history of English Law or of English opinion, he necessarily follows the historic method which characterised Maine's *Ancient Law* but was disregarded by Bentham. There is a fascination in following the conclusions on the facts as presented. Some persons may object to his inferences from the facts; an objector would be bold to challenge Mr. Dicey in the arena which he has chosen.

The Introduction naturally stands first, though it refers to the latest

[1] *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century.* By A. V. Dicey, K.C., Hon. D.C.L. (Macmillan & Co., 1914. 10s. 6*d*. net.)

period of time. In treating of the state of legislative opinion at the end of the nineteenth century, Mr. Dicey dwells on the prevalence of Benthamite liberalism, based on the principle of utility and "the *laissez faire* of common sense" in the middle, and their loss of influence by the end, of the Victorian Era—the current opinion having moved in the direction of collectivism, the school of opinion often termed socialism from its policy of benefiting the people collectively as a whole rather than individually. He illustrates the progress of collectivism by analysing various Acts of Parliament passed during the thirteen years since 1900, enactments which, though to a certain extent defensible on Benthamite grounds, would hardly have been passed when Benthamite liberalism was the dominant opinion of the day. The causes or conditions which, since 1900, have increased the influence of socialistic ideas are thus summarised: the existence of patent facts which impress upon ordinary Englishmen the interdependence of private and public interest: the declining influence of other movements; the general acquiescence in proposals tending towards collectivism (resulting partly from the delusive doctrine that in the political world "nothing signifies"); the advent in England of Parliamentary democracy; the spread of collectivism or socialism in foreign countries; the existence of industrial discontent or warfare. But the main current of legislative opinion is liable to be affected by counter and cross currents, such as the surviving belief in the policy of *laissez faire*, the inconsistency between democracy and collectivism (as explained carefully and illustrated), the opposition to the expensiveness or the financial burdens of collectivism (as testified by the growing taxation and public rates), and some dangers are indicated from a combination of socialistic and democratic legislation.

C. E. Buckland.

PERIODICALS.

In the *American Political Science Review* for February, Dr. J. Bassett Moore makes out a powerful case against the objections of those who decry international law as a vague sentiment, not entitled to the name and prestige of law. He shows how that view is largely attributable to the influence of Austin, whose speculations are declared to be by no means so "innocuous" as Maine labelled them. "A moment's reflection suffices to show that Austin's so-called definition is at most merely a description of municipal law, and even for that purpose is not sufficiently comprehensive" . . . yet, "it may easily be shown that at one time Austin's relegation of international law to the sphere of morality had a pronounced effect, even upon legal decisions in England." When, however, Dr. Moore comes to desiderate a law court and legislature, and perhaps an armed force, for use in international affairs, he is really desiring to substitute municipal law for international law as the rule of the world. His vindication of the force and reality of international law

therefore falls a little flat. "International law is on the whole as well observed as municipal law. Perhaps one would not go too far in saying that it is better observed, at any rate in time of peace. . . . If one could only reflect upon the smallness of the number of international claims that arise in times of internal and external peace, one would not be disposed to question the correctness of this statement." This is admirable and true; but then, why the anxiety to destroy the system by the introduction of a coercive apparatus of which the world is getting a little ashamed? Such a substitution would not even remove or lessen the possibility of armed conflicts. Civil war, as Dr. Moore is at pains to point out, is by no means an extinct or unknown phenomena. Ireland, and an unnamed State of the Union where "a condition of things resembling war" was "lately" witnessed, point the moral. A parting criticism of a very suggestive paper may be that the author displays a very touching faith in the value of the franchise—which in wide areas of government means generally the substitution of the machine of vote-organisation for the machine of government, and may act as a cloak for tyranny.

The federal system inevitably produces encroachment by the central power: a fact which should give the supporters of elaborate schemes of world-federation pause. Mr. McClain candidly admits, in his paper on "Constitutional Decisions," that Congress is pushing forward its legislative activity. *Pacific Telephone Co.* v. *Oregon* (223 U.S. 118), we learn, establishes that direct legislation by "initiative" is "republican" government.

We observe that eight Western States and Massachusetts have minimum wage laws. These, however, apply only to the earnings of children and women. In Massachusetts and Nebraska publicity is the sanction resorted to: the other States invoke the criminal law. In California and Oregon the decisions of the commissioners are conclusive, but in other States there is usually an appeal to the Courts.

T. Baty.

Sir Henry Juta, the new Judge President of the Cape of Good Hope Provincial Division and Additional Judge of Appeal, is the subject of the portrait and biography in the February number of the *South African Law Journal*. As reporter of a long series of the Cape of Good Hope Supreme Court Reports and the translator of Van der Linden's classic work, his name is well known to all who have any occasion to refer to South African law. The position which he attained within the Union as an advocate justifies the anticipation of the biographer that on the Bench he will be found to be a distinguished successor of Lord De Villiers.

Mr. S. B. Kitchin shows that the rules which have been adopted in respect to contracts with alien enemies are supported by Grotius and Bynkershoek, though the latter would go farther than the English law in one important point. Bynkershoek "allows no exception in favour of an alien enemy who is residing within the jurisdiction with licence of the Crown, but

states it as an absolute rule that all alien enemies have no *locus standi* in our Courts. He goes on to say that 'if you exclude the enemy from your Courts, you cannot rightly sue him there if he chance to remain in your territory,' for, as he argues, it would be unfair to the enemy, as was decided by the Supreme Court of Holland on September 18, 1590. He says that it would be impious to forbid an enemy to sue and not allow him equal rights in the matter of being sued." The Supreme Court of Good Hope has decided, however, that an enemy can be sued "if means can be found to bring him into our Courts, and to exercise jurisdiction in respect of him." [1]

An important article, initialled "E. R. R.," reviews the extent of the jurisdiction exercised by the Appellate Division of the Supreme Court of South Africa as successor to the Judicial Committee of the Privy Council. In regard to appeals as of right it is considered that the transfer is complete. The Supreme Court has also succeeded to the prerogative power to grant special leave to appeal from the various Provincial Divisions in which, before Union, the only appeal would have been an appeal to the Judicial Committee by special leave. The opinion is expressed that there are certain limits upon the appellate powers of the Court as, for example, in regard to an appeal from an Immigration Board to the Provincial Division of the Supreme Court, which is to be "final and conclusive." It is suggested that there may be under the statute an appeal to the Minister whose refusal to intervene might be remedied by a petition to the Crown, and that might become a proper matter for special reference to the Judicial Committee.

The "Notes" include a record of the visit of M. Standaert, the *batonnier* of the Flemish Bar at Bruges, to state the justice of the cause of Belgium before the public and the profession in South Africa.

[1] *Ex parte Savage and others*, C.P.D. September 15, 22, 1914, 827.

NOTES.

Military Service in the Channel Islands.—It has been claimed on behalf of the Channel Islands that "had Great Britain had some system of training such as theirs all the trouble of forming new armies would not have arisen. The armies would have been provided with arms and accoutrements, and in two months would have been ready for the front." Mr. E. T. Nicolle contributes an historical note which shows how deep-rooted in the history of the islands is the obligation of the islanders to defend their shores:

"Military service in the Channel Islands had its origin in the feudal system. The lords of manors in the Channel Islands were bound to find levies, maintained at their cost, for the defence of the islands. In practice, however, as early as the fourteenth century we find the Crown maintaining small garrisons in the Royal Castles in both Jersey and Guernsey, whilst the islanders provided for the defence of the islands. In the Record Office there exists an interesting letter on this subject written in French by Jean de Roches, who was Keeper of the Islands in 1328, in which he speaks of 'le power del pais,' by which he meant the Militia. With the Tudors, the local levies seem to have been taken out of the power of the lords of manors, and they were cast into the form of a public Militia. Every Channel Islander owed service in the Militia for the defence of the islands only. They could not be compelled to go beyond the seas. This Militia was originally organised on the basis of the parish. Each company was put under the command of a parochial captain, apparently elected by the people. By the beginning of the seventeenth century the Militia in its new character had become a considerable force. A return for Jersey made in the reign of James I. shows that each of the twelve parishes furnished a company, and that the island could muster 3,000 men capable of carrying arms. There were three regiments of four companies each. Each parish had its ordnance, powder magazine and rifle range.

"In the Civil War period the Jersey Militia resisted Cromwell's troops from 1643 to 1651. In 1781 the Jersey Militia victoriously defended the island against a French attack.

"The Militia of the islands consists of Infantry and Artillery regiments, and may be regarded as a frontier force; throughout all changes, it has maintained a considerable vitality. The service is personal, obligatory and gratuitous."

Legal Education.—Mr. Hampton L. Carson, who is well known by his "History of the Supreme Court of the United States," directs attention in the *American Law Review* (vol. 48, pp. 859-873) to what he considers an important defect in the American system of legal education. His observations are not without interest for those who are concerned with legal education elsewhere. Briefly stated, his main criticism is that the system in the United States tends to become too academic, and does not pay sufficient attention to the maintenance of the traditions of the Bar. "Men," he writes, "are lacking in manners, though not in manner; guilty of improprieties and of bad form, offending, not so much wilfully and from lack of principle, as from ignorance and lack of instruction." His remedy for this state of affairs is: "Let the chairs of practice be vacated by the pure scholars. Do not let them be filled by retired practitioners or those about to retire. We must guard against atrophy. Let the chair of practice in each school be filled by an active member of the Bar, whose presence in the Court room is a familiar presence, and let him teach ethics as he discusses remedies. He will know what he is talking about, and his experience and observation will supply him with practical and actual illustrations." Whether the professor of the law is quite so incompetent to teach its ethics as Mr. Carson suggests in his article is a matter upon which there is room for some difference of opinion; but the desire to maintain a high standard of culture and conduct is one shared by those who have at heart the best interests of the legal profession on both sides of the Atlantic.

Calcutta Prize Court.—*The Calcutta Weekly Notes* (vol. xix. p. iii) contains an interesting article dealing with the history of the Prize Jurisdiction of the High Court at Calcutta, from which the following notes are extracted:

"The Charter of the Supreme Court gave Admiralty Jurisdiction to the Supreme Court over Bengal, Bihar and Orissa and all territorial waters therein. In the year 1782 an application was made on behalf of George Johnstone, commodore of a squadron of His Majesty's ships in the East Indies, to adjudge the ship *Hinchinbrook* which was captured at Madras for being brought to and condemned as prize in the Supreme Court of Calcutta. Sir Elijah Impey C.J. held that the Court had no jurisdiction to entertain prize causes. He was of opinion that the Ordinary Admiralty Jurisdiction of the Court did not confer Prize Jurisdiction on the Court unless it was specially conferred. The learned Chief Justice undoubtedly took the right view of the matter. In 1793 the French vessel *La Bien-Aimée* was captured on the river Hooghly and at the port of Calcutta by the forces of the East India Company in an engagement when war existed between England and France. An application was made before Chambers C.J., Hyde, Jones and Dunkin JJ., to have the vessel condemned as a legal prize. It seems to have been admitted in that case that clauses 26 and 28 of the Supreme Court Charter contemplated only civil admiralty jurisdiction between individuals in marine cases and did not refer to Prize Jurisdiction. But reliance was placed upon

Lord Mansfield's dictum in *Le Caux* v. *Eden*[1] that since the reign of Queen Elizabeth this jurisdiction had been exercised by the Judge of the Admiralty not under any special commission but by virtue of the 'inherent power' of the Court as 'King's Commission or both.' The statute of 9 Geo. II. ch. 34 was cited to show that the jurisdiction over prize causes existed in every one of the King's Courts of Admiralty in Great Britain or elsewhere. On July 12, 1793, the Judges granted the motion. The matter thereafter came up for hearing on November 5, 1794, when the promovents (the East India Company) proved their legal right to take such prizes, but no one appeared to oppose the application. The learned Judges condemned the vessel and the cargo as lawful prize. It would seem that the captors were entitled to the prize at the time, and not the Crown. On the day that the decree was passed against *La Bien-Aimée* similar decrees were passed condemning the brig *Nestor*, the schooner *Chandernagore* and the vessel *Bien Foisant*. In none of the above cases do we find any considered judgments given.

"The first case in which the question of jurisdiction of the Supreme Court at Calcutta in the matter of prizes was gone into by the learned Judges of that Court was in the matter of the frigate *La Forte* in 1799. There being war between England and France at the time, the English frigate *Sybille* brought the French frigate *La Forte* under capture to Fort William in Calcutta and applied in the Admiralty Division of the Supreme Court for its adjudication as lawful prize. The application was made by Burroughs, Advocate-General, who in his argument claimed jurisdiction for the Court by virtue of 13 Geo. III., Clause 63 and Clause 13 of the Supreme Court Charter which conferred on the Court full power and authority to exercise and perform all admiralty jurisdiction. He maintained that although the Court of Admiralty in England could not exercise its latent jurisdiction in prize matters unless it was empowered by the Lords Commissioners to act at the outbreak of every fresh war, yet the general terms of the Charter of the Supreme Court at Fort William obviated the necessity for the conferment of such special powers in the matter of prizes. He urged further that on ground of public policy and for public good such jurisdiction must be presumed to exist in the Court.

"Anstruther C.J., Royds and Russel JJ., held that the Supreme Court of Judicature had no Prize Jurisdiction. The Chief Justice reviewed the history of the Prize Jurisdiction of the Court of Admiralty in England, and held that as the Court of Admiralty in England could not then exercise jurisdiction in the matter of prizes unless a notification of a declaration of war by His Majesty was made, the Supreme Court having received no such notification it could not act as a Prize Court. This portion of the Chief Justice's judgment may lend some support to the view that the Prize Jurisdiction existed in this Court in dormant or latent condition, which would become patent on a notification being issued of a declaration of war by His Majesty. His Lord-

[1] 2 Doug. 615.

ship drew a distinction between the Ordinary Admiralty Jurisdiction and the Jurisdiction in the matter of Prizes.

"The next case is in the Vice-Admiralty Court of Bengal, in the matter of the ship *Edward Miles* (1825). In this case an application was made on behalf of the captors for monition, etc., but the Court (Sir Charles Edward Grey) rejected the application, holding that in the absence of a Special Prize Commission the Court had no jurisdiction. In the year 1837, however, an application was made in the Supreme Court in its Admiralty jurisdiction on behalf of the officers, seamen, mariners and soldiers of H.M. ship of war the *Andromache*, in the matter of claim for bounty under 6 Geo. IV. c. 49, for the capture of piratical ships and vessels. The application was for the taking of such evidence as the petitioners might adduce, and that the same might be certified by the Court to the Commander-in-Chief of His Majesty's ships in the East Indies. The application was entertained by Sir Edward Ryan on January 30, 1837, as it was stated that the *Andromache* was about to sail immediately and that the evidence offered could not be obtained elsewhere. The Court admitted the petition, but the Commissary of the Vice-Admiralty Court intimated that by so doing the Court must not be understood to prejudge the question of jurisdiction, which was reserved for the consideration of all the Judges of the Supreme Court as a Court of Admiralty. January 31 was assigned for moving in the matter, and on that day Counsel for the petitioners moved that they might be declared entitled to a bounty of £1,445 under s. 1 of Geo. IV. c. 49. On February 1 the Court (evidently through the Chief Justice, who was His Majesty's Commissary of the Vice-Admiralty Court) expressed its opinion that the claim of the petitioners was proved to that extent, and ordered 'that a certificate of the said proof and proceedings should be made out and prepared by the Registrar, pursuant to the direction of the statute.' It is thus evident that the Court did after all exercise jurisdiction in a matter falling strictly within Prize Jurisdiction. It is worthy of note that on the same January 30, 1837, another application was made to the Supreme Court in the matter of prizes, and the Court being doubtful whether it had jurisdiction on its Admiralty Side to entertain such matters under the general powers of the Charter, directed the petition to be presented to the Chief Justice in person executing the office of His Majesty's Commissary of the Vice-Admiralty Court under the Commission of 1822.

"In the same year another similar application was made on behalf of His Majesty's sloop *Wolf*, but beyond examination of witnesses nothing was done in the matter, and the claim was eventually withdrawn from this Court and prosecuted in England. It is by no means clear whether the Supreme Court of Judicature at Calcutta as a Court of Admiralty prior to 1800 could exercise Prize Jurisdiction on the declaration of war with any country being made known to it by the Lords High Admiral in England without any Special Commission to the Court.

"But by s. 25 of the Government of India Act of 1800 (39 & 40

Geo. III.) power was given for the issue of Commission from the High Court of Admiralty in England for the appointment of all or any of the Judges of the Supreme Court of Judicature at Fort William in Bengal or of similar Courts in Madras or Bombay, when created, for the trial or adjudication of Prize Causes. Commissions were issued in pursuance of the above statute on various occasions between 1808 and 1843 by which the Chief Justices for the time being were respectively appointed the Commissaries in the Vice-Admiralty Court of Calcutta and the territories thereto belonging. The Letters Patent of 1862, clauses 31 and 32, gave the same jurisdiction to the High Court at Fort William in Bengal as had been exercised by any Judge of the Supreme Court as Commissary to the Vice-Admiralty Court and also jurisdiction for 'the trial and adjudication of Prize Causes.' This jurisdiction was also continued by cls. 32 and 33 of the Letters Patent of 1865. But the jurisdiction so conferred must be read subject to s. 25 of the Act of 1800 above referred to, which provided for the appointment of Commissaries by special authority under that statute. In the Commissions which had been issued under 39 & 40 Geo. III., the Chief Justice for the time being was appointed under the designation of 'Commissary of the Vice-Admiralty Court of Bengal and territories thereunto belonging.' Under the Naval Prize Act of 1864 (27 & 28 Vict. ch. 25) the High Court of Admiralty in England was constituted a Prize Court for the whole of the British Dominions, and every other Court exercising similar jurisdiction was comprised in the term 'Vice-Admiralty Prize Courts.' It also provides that all appeals from any decree or order of a Prize Court shall lie to the Judicial Committee of the Privy Council.

"Under the Colonial Courts Admiralty Act, 1890 (53 & 54 Vict. ch. 27) all Vice-Admiralty Courts were abolished and all Courts exercising unlimited Admiralty Jurisdiction were styled Admiralty Courts.

"By the Prize Courts Act of 1894 (57 & 58 Vict. ch. 39) s. 25 of the Government of India Act of 1800 was repealed, and it was provided that Commissions may be issued by His Majesty or the Admiralty for the constitution of Prize Courts in any part of British possessions even at the time of peace. Where a Prize Court has been constituted by such Commission in any British possession, upon the Vice-Admiral of such possession declaring under the instruction of His Majesty that war has broken out with any country, the Prize Court so constituted would commence exercising its jurisdiction in Prize matters. The Court which was constituted at the High Court of Fort William in Bengal upon the declaration of the present European War derived its jurisdiction in the above manner. The Commission was issued in January 1900; and upon the Viceroy and Governor-General of India, who is His Majesty's Vice-Admiral in India, declaring by notification in the *Gazette of India* that war had broken out between Great Britain and Germany on August 2 last, the High Court at Calcutta under the terms of the Commission became vested with the jurisdiction of a Prize Court in this

Presidency. The expression 'course of Admiralty' both in the Commission of 1900 and the previous Commissions of the Supreme Court, would indicate that the Prize Jurisdiction has to be exercised in the Admiralty Jurisdiction of the Court on the terms of the Commission being fulfilled. The further fact that the reports of Prize cases in the Calcutta Supreme Court as also the minutes of proceedings appear in the Admiralty Jurisdiction of that Court would go to support our view."

The "British Empire."—There seems to be no legal definition of the "British Empire" upon the statute-book of the United Kingdom. The phrase "British Dominions" was defined in the Copyright Act 1842 "to mean and include all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements and possessions of the Crown which now are or hereafter may be acquired" (s. 2). But the definition is not included in the Copyright Act 1911, and instead there is a definition of "self-governing dominion," thus showing the development of the use of the word "Dominion" in this connection. "British Islands" and "British Possessions" are defined in the Interpretation Act 1889. It is equally difficult to trace any definition of the British Empire in the legislation of other parts; but in an ordinance made by the Consul at Muscat to secure the control of the Press during the war there is an "explanation" that "the expression 'British Empire' includes all territories under the suzerainty or protection of His Majesty." This, therefore, seems to be the first legal definition of the phrase.

The English Moratorium in a Neutral State.—"The influence of the European war on neutral America" (we quote from the *Harvard Law Review*) "has many interesting sidelights. One striking illustration of the interdependence of the commercial communities on both sides of the Atlantic is afforded by a recent dispute between New York merchants over the effect of the English moratorium, a sort of measure which prior to August 1914 seems to have been unheard of in English and American law. An opinion was given by the Hon. Edgar M. Cullen, formerly Chief Justice of the New York Court of Appeals, to whom the matter was referred as arbitrator. *In the Matter of the Arbitration Agreement between Lazard Frères and L. Vogelstein & Co.*, 52 N.Y.L.J. 801. Before the war, a New York banking house made a loan of bills of exchange drawn upon its London correspondents. The borrowers agreed to refund three days before the maturity of the bills in London, at the then prevailing rate of exchange on London. The bills fell due after the outbreak of war, but the acceptors did not take advantage of a moratorium which had been proclaimed,[1] and paid them at maturity. The

[1] This was the Royal Proclamation of August 2, 1914 (No. 1164). The Postponement of Payments Act, ratifying the proclamation and authorising them in the future, became law on August 3 (4 & 5 Geo. V. c. 11), the second time in English history that a statute has passed through all its stages and become law in a single day. 58 Sol. J. 758, 759.

question was whether the New York banker could hold the borrower liable on his contract at the extremely high rates of exchange then prevailing.

"It was held that he could. The acceptors, who had been supplied with funds to meet the bankers' accruing obligations, were not bound to invoke the moratorium in order that the borrowers might secure the benefit of a possibly lower rate of exchange in the future.

"No decision involving this point has been found in the rapidly increasing number of reported English cases dealing with various phases of the recent moratoria, but the result seems to be in accordance with the spirit of the Act. It was an emergency measure for the benefit of debtors. They were not obliged to accept its privileges. Indeed, a moratorium proclamation subsequent to the one here in dispute expressly provided that payments before the expiration of this special period of grace were not forbidden."[1]

Industrial Arbitration in Canada.—The Registrar of Boards of Conciliation and Investigation in reporting upon the proceedings of the Canadian Industrial Disputes Investigation Act gives some statistics of the cases under the Act during the seven years for which it has been in operation.

"In all," he writes, "161 applications have been received during the seven years covering the life of the Act, as a result of which 141 Boards have been established. In nineteen cases the matters in dispute were adjusted by mutual agreement, whilst steps were pending for the establishment of Boards, and one remaining application was under consideration by the Department at the end of the year. The total number of employees affected by these 161 disputes was 222,817, or an average of 1,384 in each dispute.

"During the seven years there were in all eighteen disputes in which the threatened strikes were not averted or ended as a result of reference under the Act. Eleven of these eighteen strikes occurred in the mining industry, one in the operation of railways, five concerned employees in railway offices, shops and yards, and one in the operation of a street railway. None of these strikes occurred during the last fiscal year."

It is of interest also to note his impartial estimate of the utility of the Act for the settlement of industrial disputes and the promotion of satisfactory relations between employer and employed.

"The value of the foundation principle of the Act, that of referring for conciliation and inquiry a troublesome industrial dispute before a strike or lock-out is declared, was never more clearly demonstrated than during the past fiscal year, the outstanding feature of which, as to these matters, has been that in every case where a dispute was so referred the strike which had been feared was averted and work continued steadily. On the other hand the most serious dispute of the year was that of coal miners on Vancouver Island, in which case, neither party taking advantage of the Act, its machinery could not be utilised. The settlements of the past year, as to disputes dealt

[1] Proclamation of September 30, 1914, s. 4, 58 Sol. J. 854.

with under the Act, were effected in various ways, sometimes by direct agreement, sometimes by the informal elimination of the cause of friction, tactful procedure on the part of the Board being usually and naturally the chief influence in bringing this about."

An important point which appears from his survey is the impotence of the authorities if the parties to the dispute are not willing to submit their points of disagreement to the decision of an outside body.

Canadian Bar Association.—*The Canadian Law Times*, which has taken a new lease of life under the able editorship of Mr. A. H. F. Lefroy, K.C., contains in the May issue two of the addresses delivered at the first annual meeting of the Canadian Bar Association. The President, Sir James Aikins, K.C., M.P., dealt with the methods of advancing the science of jurisprudence in Canada. He showed how large might be the contribution of the lawyer to the advancement of the national life.

Address by Sir James Aikins.—"The lawyer's sphere," he said, "cannot be as clearly defined as that of the doctor of medicine or the minister. His range is wider, *hic et ubique*, his duties multifarious, his training more versatile. Moreover, the constant practice in caring for his clients, in assuming their burden and the direction of their many affairs, added to the training of his student life, naturally increases in the lawyer that habit of service and usefulness for others. The frequency with which he examines both sides of the various questions submitted to him tends to impartiality and a judicial and temperate habit of mind. Further, the vigorous participation in affairs with the purpose to do right amid the many lures and temptations incident to his vocation is the most wholesome moral tonic which nature can have. Such employment does not certainly cultivate the scruples of the casuist or the glowing visions of the seer, but it does stimulate and strengthen for the robust work of the world, and the accomplishment of noble purposes, which end in things well done and not in dreams. Time was when the lawyer was regarded as aloof from the practical affairs of the world, as the learned and dignified aristocrat of society who did not concern himself with the daily duties of common life or the struggle of the people to improve their condition. Now, in our democratic country, the members of the profession are not only with the people but of the people, working among men, advising in their personal affairs, sympathising in their efforts, guiding in their business, aiding in their social movements for reform, taking share in all the departments of public government, yet, withal, maintaining the professional ideals of the past, their intellectual attainments, dignity, strength of honour and independence of character, which will not cringe before Courts or be carried away by popular emotions or a hostile press."

The main purpose of the President's address was to enter a plea for the simplification of the law by some form of consolidation or modification, especially in the interests of the commercial community, of whose needs he

has wide experience. Having set forth some of the reasons commonly urged in favour of codification, he continued:

Plea for Codification.—"One reason, and perhaps it is most forcible of all for keeping the codification of the common law continually in view, is its influence on the unification of law throughout the Empire. Most of the improvements in the form of the English law are followed up after no long interval by substantially identical legislation in the British Dominions. The Bills of Exchange Act, the Partnership Act, and the Sale of Goods Act, for example, have been adopted largely in British Dominions. The Criminal Code, recommended by the English Commissioners, but not yet adopted by the British Parliament, was enacted by our Federal Parliament. The Bills of Exchange Act has largely influenced the enactment of the Negotiable Instruments law, which has now been adopted in nearly all the States and Territories of the American Union.

"What Rome did under equally difficult circumstances, what other intelligent and strong nations have done, Canadians can do. This youngest of the nations, heir of all the ages, was not born for a position of insignificance, but of greatness. It needs the leadership of our best jurists and lawyers.

"In addition to the tendency in the common law provinces toward a form of codification such as prevails in Quebec and leading to a greater similarity of Canadian jurisprudence, there are other influences ceaselessly at work to create a more general and better jurisprudence. The convenience of interprovincial business requires it."

The last point was elaborated in Mr. Lafleur's paper, which also emphasised the advantage of uniform legislation throughout the Dominion and harmony with the United Kingdom in the interests of business relations.

Diversity in Canadian Legislation.—"What could be more beneficial," he asked, "to the business community than a uniform statutory code on commercial sales? No difficulty has been found in applying the Sales of Goods Act to England and Scotland, and . . . the Sales Act has already been adopted in eleven jurisdictions in the United States.

"The law of insurance in Canada presents an example of wasteful and unnecessary discordance. Every province has an insurance law of its own, for the most part in the form of a statutory code, and while these systems are not differentiated by any fundamental principles, they abound in minor diversities calculated to produce conflicts and uncertainty. For instance, the statutory conditions prescribed for insurance policies vary in the several provinces, so that a great transcontinental railway is unable to get a uniform cover on its rolling stock throughout Canada, but must submit to a modification of its contract every time it crosses a provincial boundary line. The matter is further complicated by the fact that a Dominion insurance law is superadded to the various provincial enactments, and the companies must satisfy the requirements of nine or ten insurance departments before they can do business throughout Canada.

"Our company law is in an equally unsatisfactory condition. There are nine different kinds of provincial laws governing joint stock companies, and a federal law in addition. The provinces are given the power of incorporating companies 'with provincial objects,' and the Dominion incorporates those whose objects are not so restricted. We have been litigating for years in order to ascertain the scope and meaning of these restrictive words, with the result that a great diversity of judicial opinion has been expressed. . . .

"Our provincial taxing statutes furnish a conspicuous instance of overlapping and conflicting legislation resulting in manifest injustice. As you know, the local legislatures have the power of imposing 'direct taxation within the province.' Whether you determine what is within the province by reference to the domicile of the owner or to the local situation of the property, it seems clear that the British North America Act did not intend that the same property should at one and the same time be regarded as being within the Province of Quebec and within the Province of Ontario. One or other of the rules as to *situs* must be adopted, but both should not prevail so as to expose the taxpayer to double taxation. And yet the ingenuity of the Treasury draughtsmen in all the provinces is exercised in reaching out beyond the jurisdiction. Take, for instance, the Ontario Amendment to the Corporations Tax Act, 1914. It purports to impose a tax calculated upon the gross premiums received by insurance companies in respect of the business transacted in Ontario, and then proceeds to enact that a premium is deemed to be in respect of business in Ontario if it is payable or if it happens to be paid in Ontario or if it is payable in respect of insurance of a person or property resident or situate in Ontario at the time of payment, even where the business is transacted wholly outside of Ontario. Inasmuch as Quebec also imposes a tax on gross premiums, these companies are inevitably exposed to double taxation on the same business. . . .

"The law of wills offers great opportunities for improvement. It should be easy to standardise all matters relating to their formal validity, so as not to defeat the clearly expressed intentions of testators. For instance, why should a holograph will validly made according to the laws of Quebec be inoperative as to real estate situated in the other provinces?[1] Why should the rules governing the revocation of wills be different in different provinces, so that a person making his will when domiciled in one jurisdiction unwittingly revokes his will by becoming domiciled in another jurisdiction and marrying therein, although no such revocation would have taken place according to the law of the original domicile?[2] Again, there is urgent need for the adoption of uniform rules for the distribution of estates when the property, both moveable and immoveable, is situated in different jurisdictions. In no province is the machinery adequate for such purposes; on the contrary, there seems to be an almost total absence of such ancillary provisions as an enlightened spirit of comity between provinces would

[1] *Ross* v. *Ross*, 25 S.C.R. 307. [2] *Seifert* v. *Seifert*, 7 O.W.N. 440.

suggest, in order to facilitate the prompt and inexpensive distribution of the estates of decedents.

"Equally objectionable is the diversity in the rules governing the authority and effect in one of the provinces of judgments rendered in another. In order to facilitate the adoption of uniform rules on this subject it may be advisable in the first place to render uniform the rules of procedure relating to the assumption of jurisdiction by the Courts of the different provinces, so that there may be as little overlapping and competition as possible.

"Even when we are legislating upon new questions of general interest which transcend the bounds of the province and which have no foundations in the past, we work in isolation instead of in concert. The Workmen's Compensation Acts are not based on the existing law of torts in the several provinces, but, on the contrary, involve a distinct departure from traditional principles. They embody a new theory which recognises the inadequacy of the ordinary legal principles of responsibility, and which substitutes therefor the view that risks incidental to a business should be a charge on that business. This was pre-eminently a case for co-operative effort in order to produce uniformity of treatment throughout the whole Dominion, instead of allowing separate provincial commissions to create diversity and conflict where none previously existed. As a result we have confusion, uncertainty, and contrariety, where it would have been humane to make the law simple, sure, and uniform, and to produce a measure that would not have compelled the unfortunate victim to go through two or three Courts before ascertaining what his rights are.

"Not only does the substantive law invite the efforts of the reformer, but also the law of procedure. Many a suitor is deterred from pressing his claim in a sister province by the unfamiliar terms and methods employed in another forum than his own. Here, at least, we should not be hampered by the traditions of the past, for archaic forms and practices are survivals of a period when the rights of the litigants were too often lost sight of in the intricacies of procedure. Procedure should be the obedient handmaiden, and not the arrogant mistress, of substantive law. Some of our provinces have made greater strides than others in their emancipation from rigid and technical forms of practice, and nothing but good would result from an attempt to assimilate the different systems.

"The subjects which I have selected for your consideration do not by any means exhaust the list of those which might be suggested. They are merely given by way of illustration, and my purpose has been attained if I have succeeded in convincing you of the possibility and desirability of nationalising our jurisprudence."

It is gratifying to find the Canadian Bar Association thus dealing with a subject which has constantly engaged the attention of the Society of Comparative Legislation. Greater uniformity in the legislation of the

provinces of the Dominion and the States of Australia will prepare the way for legislation which will be Imperial in its operation whether enacted at Westminster or in the Dominions.

Registration of Title in America and Canada.—"Registration of title in the United States," writes Mr. J. E. Hogg, "has reached a very definite stage. It has been dealt with by the Conference of Commissioners on Uniform State Laws. This body—which might serve as a model for a useful institution in the British Empire—has taken into consideration a draft statute as a model for a uniform State law on the subject of registration of title to land. The Report of the Committee which prepared the draft statute is printed in the first number of the *American Bar Association Journal.* The Committee state that the chief obstacle to the more rapid spread of the 'Torrens' or title registration system in America has been the opinion held by many lawyers that statutes introducing any such system were liable to be held unconstitutional by the Supreme Court of the United States. This opinion the Committee proceed to controvert, and their Report consists of an interesting discussion and résumé of cases in the State Courts and one case in the Supreme Court of the United States in which these statutes have been held to be perfectly valid and constitutional. It appears that the 'Torrens' system is now at work in eleven of the American States, and the Committee might, it is believed, have added to these the names of two Territories—the Philippine Islands and Hawaii. The publication of the draft statute referred to should do a great deal to extend the operation of registration of title in the United States. This statute is valuable to the English lawyer as giving in a compressed and generalised form what may fairly be presumed to be the best part of the contents of the State statutes on the subject. The study of the American type of the Torrens system of registration is thus greatly facilitated.

"An article on Canadian mortgages as a field of investment is reprinted from the *Journal of the Institute of Actuaries.* Though written from the point of view of the business man and not the lawyer, the paper is of some interest as illustrating the hold that the 'Torrens' system has taken on Canada. The writer—Mr. Arthur Digby Besant—speaks of this system as 'employed almost universally in the prairie provinces and in British Columbia,' and this is, it is believed, perfectly correct. Some of Mr. Besant's statements on the legal systems prevailing in the different provinces are not quite accurate, and these seem to have been set right in a discussion which followed the reading of the paper. This does not lessen the value of the paper as a contribution to the borderland between law and business."

Care of Children.—A comparison between the law relating to the protection of children in India and that of other countries has been made in a series of articles in the *Criminal Law Review* (Madras). Attention is directed to omissions in the law and its administration. On the other hand, there are examples which show that in some respects the Indian law is

stronger than that of other countries. The sections of the Indian Penal Code relating to the moral well-being of children are not intended, as Nelson points out, "by confounding the provinces of law and ethics to make men virtuous by legislative enactment, but to protect the chastity of minors and to assure to them the freedom of choosing married life when they attain their age."[1] "The offences," continues the writer in the Review, "in the eye of the law are very heinous and consequently very seriously dealt with, the offenders being liable to ten years' imprisonment and fine. In England and America, on the contrary, the offenders are guilty of misdemeanour only and are liable only to a fine of £25 or six months' imprisonment. In Holland and Switzerland and in many of the European countries these offences are regarded only as torts or civil wrongs, the remedy being recompense to the injured party. The person who commits even adultery can be bought off for a few pounds. This difference can only be accounted for by the divergence of ethical views and by the fact that in India chastity is considered to possess greater sanctity, the violation whereof deserves heavier punishment than in other countries."

There seems to be one widely prevalent Indian custom which is harmful in its results to children but does not receive direct legal prohibition. It is thus described: "In India there is a peculiar mania prevalent among all sorts of people of whatever caste or creed to adorn their children with costly jewels. They do not realise how much temptation they cause to the avaricious thief who, to possess himself of the jewels, may do all sorts of grievous injuries to the child, and sometimes unhesitatingly make away with its life. The innumerable child-murders that are rife throughout India may partly be attributed to this imprudent act of the parent, and it is not within the province of legislature to interfere in such matters and warn the parents as to the inadvisability of decking their children with jewels. The legislature, however, punishes the person who kidnaps or abducts any child under the age of ten years, with the intention of taking dishonestly any movable property from the person of such child, with imprisonment up to seven years (s. 369, I.P.C.), and if the offender deliberately kills the child for that purpose he will be hanged under s. 302. The necessity for any such provision of law will not arise in any other country, as the wearing of jewels is peculiarly indigenous to India. In Egypt this custom prevails to a little extent."

Protest of the French Society of Comparative Legislation.—Our confrères of the Société de la législation comparée have made the following protest against the violations of the rules of international law committed by the Germans:

"Vu:

"1° Les articles 7 et 25 du traité de Londres du 15 décembre 1834 et l'article 7 du traité de Londres du 19 avril 1839 qui ont stipulé que la

[1] [1888] 11 M. 393.

Belgique formerait un État indépendant et perpétuellement neutre et que cette neutralité serait garantie par les Gouvernements d'Autriche, de France, de Grande-Bretagne, de Prusse et de Russie ;

" 2° L'article 2 du traité de Londres du 11 mai 1867 aux termes duquel le Grand-Duché de Luxembourg doit former un État perpétuellement neutre, cette neutralité étant placée sous la garantie collective des puissances signataires (Autriche-Hongrie, France, Grande-Bretagne, Italie, Prusse et Russie) ;

" 3° Les articles 1, 2 et 3 de la Convention n° IV concernant les lois et coutumes de la guerre sur terre signée à La Haye le 18 octobre 1907 par l'Allemagne et 43 autres puissances et les articles 23, 25, 26, 27, 28, 46, 47, 50 et 56 du règlement annexé à ladite Convention ;

" 4° Les articles 1, 2 et 10 de la Convention n° V du même jour concernant les droits et devoirs des puissances et des personnes neutres en cas de guerre sur terre ;

" 5° Les articles 1 et 6 de la Convention n° IX également signée à La Haye le 18 octobre 1907, interdisant le bombardement par des forces navales des ports, villes, etc. . . . , qui ne sont pas défendus.

" *Considérant :* Que le Gouvernement allemand a, de propos délibéré et avec une préméditation incontestable, violé les territoires de la Belgique et du Luxembourg dont il s'était engagé à respecter la neutralité aux termes des traités ci-dessus visés de 1831, de 1839 et de 1867 ;

"Que, non content d'envahir ces deux pays, il y a fait ou laissé commettre ainsi qu'en France quantité de crimes et d'atrocités indignes d'une nation civilisée et d'ailleurs formellement interdits par les articles ci-dessus rappelés des Conventions de La Haye n^{os} IV, V et IX ;

" Qu'il s'est rendu coupable notamment :

" 1^{ent} De l'emploi d'armes et de projectiles propres à causer des maux superflus (Convention IV, Règl. Ann. art. 23) ;

" 2^{ent} De la destruction systématique par le bombardement ou l'incendie d'édifices consacrés aux cultes ou aux artes ou de monuments historiques (même règlement, art. 27 et 56) ;

" 3^{ent} D'assassinat de non-combattants de tout âge, de confiscations de propriétés privées, de pillages, etc. . . . (même règlement, art. 46 et 47) ;

" 4^{ent} De l'imposition de peines collectives, pécuniaires et autres, édictées contre les populations de territoires occupés par lui et ce, à raison de faits individuels dont celles-ci ne pouvaient être considérées comme responsables (même règlement, art. 50) ;

" 5^{ent} De la violation du territoire de puissances neutres (Belgique et Luxembourg), contrairement aux dispositions des articles 1, 2 et 10 de la Convention n° V de La Haye ;

" 6^{ent} Du bombardement par ses navires de guerre et sans avertissement préalable de ports, villes ou villages non défendus et ne contenant aucun établissement militaire ou naval (Convention n° IX, art. 1, 2 et 6) ;

"*Considérant* encore, d'une part, que c'est à la demande de la délégation allemande qu'a été inséré l'article 3 de la Convention n° IV de La Haye stipulant que le belligérant qui violerait le règlement adopté serait tenu à indemnité et qu'il serait responsable de tous actes commis par les personnes faisant partie de sa force armée ;

"Et d'autre part que l'Allemagne a méconnu le principe général inscrit au frontispice de la Convention de La Haye suivant lequel 'pour tous les cas même non compris dans les dispositions réglementaires adoptées par les Hautes Parties Contractantes les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes et du droit des gens tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique' ;

"*Est d'avis* que le Gouvernement allemand, en contrevenant aussi gravement aux lois qui régissent aujourd'hui la guerre et en violant des traités et conventions signés par lui, s'est mis en dehors du droit des gens,

"*Et dénonce* aux jurisconsultes de tous les pays, spécialement à ceux inscrits sur la liste de ses membres, cette méconnaissance générale et systématique des usages que le progrès de la civilisation avait établis et des règles adoptées dans des traités solennels."

Empire Parliamentary Association.—The United Kingdom Branch of the Association propose to issue from time to time a series of publications collecting together the information most likely to prove of service to the members of the Association in the Overseas Parliaments and also in the Home Parliament. The first of the series, which is under the editorship of the Honorary Secretary, Mr. Howard D'Egville, summarises some of the more important pronouncements upon the policy of the war which have been delivered by the Parliamentary leaders in each country of the Empire. The result is a collection of value to speakers and also of historical importance in showing the unity of the Empire in the face of an attack which some thought might have a disintegrating effect.

Regulation of Prices in Australia.—The Australian correspondent of *The Round Table* describes in some detail the arrangements made in Australia with the object of controlling prices. A Federal Royal Commission was appointed at the end of August, 1914, to collect information and report upon such matters as the supply of foodstuffs and of other necessary commodities and any other important matters relating to conditions of trade and industry arising from the war.

"Though not explicitly stated in the Commission it was intended that this Federal body would act as a co-ordinating authority in regard to the actions of the State Commissions to be appointed under the expected uniform State legislation. However, this whole plan of action miscarried ; the legislation passed by the States varied in several important features, while there has

been an almost complete absence of co-ordination in the operations of the Commissions and Boards appointed in the several States to fix prices. The work of the Federal Commissioners was brought to an end soon after the advent of the Labour Party into power in September last and no new appointments were made.

"The following statement shows the Acts passed in each State:

(*a*) With a view to fixing prices;

(*b*) For the supplementary purpose of collecting information as to stocks of commodities; and

(*c*) For the compulsory acquisition of commodities.

"The Bills introduced in Tasmania and passed by the House of Assembly were rejected by the Legislative Council.

Acts and Bills of State Legislatures Relating to Fixing of Prices and Compulsory Acquisition of Commodities.

State.	Acts for fixing maximum prices.	Acts for investigating quantities of supplies, etc.	Acts for compulsory acquisition of commodities by States.
New South Wales . .	Necessary Commodities Control Act, 1914.	Necessary Commodities Control Act, 1914.[1]	Wheat Acquisition Act, 1914. Meat Supply for Imperial Uses Act, 1915.[2]
Victoria . .	Prices of Goods Act, 1914.	Foodstuffs and Commodities Act, 1914.	
Queensland .	Control of Trade Act, 1914.	—	Meat Supply for Imperial Uses Act, 1914.
S. Australia .	Prices Regulation Act, 1914.	Foodstuffs and Commodities Act, 1914.	Grain and Fodder Act, 1914.
W. Australia .	Control of Trade in War Time Act, 1914.	Foodstuffs Commission Act, 1914.	Grain and Foodstuffs Act, 1914.
Tasmania . .	Control of Necessaries of Life Bill, 1914.[3]	Foodstuffs Commission Bill, 1914.[3]	—

The Inns of Court and the Defence of the Realm.—For some years there has been in preparation a record of the extent to which the members of the Inns of Court have contributed to the defence of the realm and the extension of the Dominions of the Crown. The hope may be expressed that when this latest chapter is finished it may be possible to complete the work for publication. In the meantime it may be of interest to direct attention to what is believed to be the earliest occasion upon which a body of members of an Inn of Court placed their services at the disposal of the Sovereign in time of

[1] In New South Wales the same Act provided both for fixing prices and collecting returns of quantities of commodities.

[2] No Act passed; Ministerial arrangements made with exporters for reservation of meat supplies for Imperial purposes. Also by Ministerial direction the Government railways refused to carry wheat for inter-State consignment.

[3] Not passed.

national danger. Among the Egerton Papers is a document signed by the Solicitor-General and ninety-four other members of Lincoln's Inn binding themselves to defend the Queen. It sets forth that the undersigned:

findinge of late by dyvers depositions, confessions and sundry advertisements out of forayne partes from credible persons well knowen to her Ma^ties^ Counsell, and to dyvers others, that, for the furtherance and advancement of some pretended titles to the Crowne of this realme, yt hath bene manifest that the lief of our gracious soveraigne lady Quene Elizabeth hath bene moost trayterously and devylishly soughte, and the same followed moost daungerously to the perill of her person, yf Almightie God, her perpetuall defender, of his mercy had not revealed and withstoode the same, by whose lief wee and all other her Ma^ties^ loyall and true subjectes doe injoye an inestimable benefyte of peace in this lande, doe, for the reasons and causes before alledged, not only acknowledge our selves moost justlye bounden with our bodies, lyves, landes, and goodes in her defence, and for her safetie to withstande, pursue and suppresse all such myschevous persons, and all other her enemyes of what nation, condition or degree soever they shalbe, or by what coloure or title they shall pretende to be her enemyes, or to attempte any harme unto her person.

In order to give practical effect to this resolution the signatories solemnly swore:

We . . . will, aswell with our joynte as perticuler forces, during our lyves, withstande, offende and pursue, as well by force of armes as by all other meanes of revenge, all maner of persons of what estate soever they shalbe and theire abettors, that shall attempte by any acte, counsell or consent to any thinge that shall tende to the harme of her Ma^ties^ royall person.

War Legislation in Manitoba.—"The legislature of Manitoba during the session just concluded passed a War Relief Act of a kind, so far as we know," says the *Canadian Law Times*, "unparalleled elsewhere, but doubtless quite justifiable upon the sound principle that nothing is too good for the men . . . who . . . are . . . ready to give their lives for the cause of the Empire. . . . The Act to which we refer provides that:

"During the continuance of the war it shall not be lawful for any person or corporation to bring any action or take any proceeding, either in any of the civil Courts of this Province or outside of such Courts, against a person who is, or has been at any time since the first day of August, 1914, a resident of Manitoba, and has either enlisted and been mobilised as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in said war, or has left Canada to join the army of His Majesty, or of any of his allies in the said war, as a volunteer or reservist, or against the wife or any dependent member of the family of any such person, for the enforcement of payment by any such person of his debts, liabilities, and obligations existing or future, or for the enforcement of any lien, encumbrance or other security, whether created before or after the coming into force of this Act, or for the recovery of possession of any goods and chattels or lands and tenements now in his possession, or in the possession of his wife or any dependent member of his family, and, if any such action or proceeding is now pending against any such person, the same shall be stayed until after the termination of the said war.

"The Act goes further and enacts that:

"If any resident of Manitoba shall enlist and be mobilised as a volunteer in the Canadian forces aforesaid or leave Canada to join the army of His Majesty or of any of his allies in the said war as a volunteer or reservist after the commencement of any such proceedings, the same shall in like manner be immediately stayed until the end of the said war.

"This legislation goes even further than the English Courts (Emergency Powers) Act, 1914, . . . and is obviously unlike our own Moratorium Act inasmuch as it is exclusively for the benefit of the men who are at or going to the front, their wives and family dependents, and inasmuch as it stays all proceedings of every kind, and not only those directed to enforcing claims against land. Indeed it specially provides that: 'This Act shall not prevent a mortgagee or person having a charge or security on land from the right to collect and receive the rents or rentable value of such land over and above an amount equal to $2,000 per annum.'"

Local Correspondents.—The Society is much indebted to the following gentlemen who have kindly undertaken to supply information about the objects and work of the Society and to enrol subscribers:

China.—Hon. C. G. Lobingier, United States Court for China, Shanghai, China.

France.—M. C. Sansas, 19, Rue de l'Université, Montpellier.

Japan.—J. E. De Becker, Esq., Foreign Board of Trade Building, No. 75, Yamashita-cho, Yokohama, Japan.

Newfoundland.—The Hon. W. R. Warren, K.C., Board of Trade Building, St. Johns, Newfoundland.

New Zealand.—J. Christie, Esq., LL.B., Law Drafting Office, Wellington, New Zealand.

South Africa.—Oswald Pirow, Esq., Box 46, Johannesburg, Transvaal.

The Editors will be glad to consider articles cognate to the objects of the Society, and to receive brief notes upon important decisions in the Courts and other matters of current interest. Communications respecting literary matters may be addressed to them c/o Mr. John Murray, 50A, Albemarle Street, W.

After the present issue the Journal will only be supplied to members of the Society. The subscription for membership is one guinea per annum, payable to the Secretary, 3 (North) King's Bench Walk, Temple, London, E.C., or the Society's Bankers, Messrs. Child & Co., 1, Fleet Street, London, E.C.

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